Petition

No. 81-982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Can the head office of a United States bank whose foreign branches have been expropriated by a hostile foreign government recover from the successor to the branches in respect of commercial obligations of the branches to the head office which were assumed by the successor under the expropriation decrees?

2. Does the mere failure by a sovereign to honor an obligation resulting from expropriation legislation, without an act of repudiation by any statute or governmental decree, constitute an act of state?

List of All Parties

Petitioner The First National Bank of Boston (International) is the wholly-owned Edge Act subsidiary of The First National Bank of Boston. The First National Bank of Boston is in turn a wholly-owned subsidiary of First National Boston Corporation, a Massachusetts corporation the shares of which are traded on the New York Stock Exchange. The partially-owned affiliates of The First National Bank of Boston and its parent, which are all closely-held, are listed in Appendix G hereto at page A105.

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IN THE

Supreme Court of the United States

October Term, 1981

No.

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner The First National Bank of Boston (International) ("BBI") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 4, 1981 insofar as that judgment reversed the judgment of the District Court in this action, entered after a trial to the Court, which awarded damages to BBI in the amount of $1,675,748.71, plus interest.

Opinions Below

The opinion of the Court of Appeals, which is officially reported at 658 F.2d 895 (2d Cir. 1981), appears in Appendix A hereto at page A1. The opinion of the United States District Court for the Southern District of New York,

which is not officially reported, appears in Appendix B hereto at page A18. The opinion of the District Court on rehearing, which is not officially reported, appears in Appendix C hereto at page A34. The opinion of the Court of Appeals in *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, which is officially reported at 658 F.2d 875 (2d Cir. 1981), to which the Court of Appeals makes reference in its opinion in this case, appears in Appendix D hereto at page A39. The opinion of the District Court in that action is officially reported at 505 F. Supp. 412 (S.D.N.Y. 1980).

Jurisdiction

The judgment of the Court of Appeals in this case was entered on August 4, 1981 (Appendix E, page A82). Rehearing and rehearing en banc were denied on October 5, 1981. This Petition is being filed within 90 days of the date of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes and Rules

The statutes and rules involved in this case, which are set out in Appendix F at the pages indicated, are as follows: (1) Cuban Law No. 851 of July 6, 1960 (A85); (2) Resolution No. 2 promulgated pursuant to Cuban Law No. 851 of July 6, 1960 (A88); (3) Cuban Law No. 930 of February 23, 1961 (A91); (4) Section 25 of the Federal Reserve Act, 12 U.S.C. §§ 601, 604 and 604(a) (A92); (5) Section 4 of the International Banking Act of 1978, 12 U.S.C. §§ 3102(b) and 3102(j) (A94); (6) Regulation D of the Board of Governors of the Federal Reserve System (the "Board"), 12 C.F.R. §§ 204.1 and 204.2 (1981) (A97); (7) Regulation K of the Board, 12 C.F.R. § 211.3(1981)

(A99); Regulation Q of the Board, 12 C.F.R. § 217.0 (1981) (A102); and (10) Articles 5 and 10, Uniform Customs and Practice for Commercial Documentary Credits (ICC Brochure No. 151) (1951 Revision) (A103).

Statement of the Case

A. The Claims Alleged and the Decisions Below

This action was commenced in April 1961 following the expropriation by the Castro Government of the Cuban Branches of The First National Bank of Boston ("FNB Boston").

The complaint sought reimbursement from Banco Nacional de Cuba ("Banco Nacional"), as the successor to all of the assets and all of the liabilities of the Cuban Branches, under 324 letters of credit issued by the Cuban Branches in favor of United States exporters of merchandise to Cuba and paid to such exporters by the head office of FNB Boston.*

In essence, petitioner alleged that by the terms of the nationalization decrees, Banco Nacional expressly succeeded to all of the assets and all of the liabilities of the Cuban Branches, that under prevailing law and commercial practice the branches must be treated as entities separate from the head office, and that FNB Boston should recover from Banco Nacional the liabilities of the branches to the head office created by the head office's payment of the letters of credit issued by the branches.

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* All of the letters of credit were issued prior to September 17, 1960, the date of nationalization. Ten letters of credit, aggregating $177,282.49 in principal amount, were paid by FNB Boston prior to September 17, 1960. The remaining 314 letters of credit, aggregating $1,498,466.22 in principal amount, were paid by FNB Boston between September 17 and November 23, 1960 pursuant to confirmations given by FNB Boston to the United States exporters before nationalization.

The District Court found that, while FNB Boston and its branches were all part of the same legal entity, FNB Boston was entitled to recover from Banco Nacional under basic principles of quasi-contract applicable to letters of credit (A24-A29). The District Court held that Banco Nacional, as the successor in interest to the Cuban Branches,

> "became entitled to and did collect the avails of the customers' side of the letter of credit transactions in pesos in Cuba, while BBI in New York, or [FNB] Boston, in Massachusetts, were required to and did, pay the beneficiaries' side of the transactions in dollars. Thereby, as the successor of the Branches, Banco Nacional became obligated in *quasi* contract to pay [FNB] Boston or BBI for having accepted the burdens of these transactions, inasmuch as it had derived the benefit." (A25.)

The District Court held that the act of state doctrine was inapplicable to these quasi-contractual obligations since the whole thrust of the expropriation scheme indicated an affirmation, and not a repudiation, of the obligations arising from the continued operation by Banco Nacional of the banking business of the Cuban Branches (A30). The District Court held, under this Court's opinion in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682 (1976), that Banco Nacional, which did not assert an act of state defense until more than ten years after this action was commenced, had failed to meet its burden of proving an act of state, and that, in the face of the affirmative undertaking of the Cuban expropriation statute, a mere failure to reimburse FNB Boston did not constitute such an act of state (A30).

The Court of Appeals, without referring to the language in the expropriation decrees pursuant to which Banco Nacional expressly assumed the "liabilities" and "obligations

peculiar to the banking operations" of the Cuban Branches, reversed, holding that the branches could not be considered separate entities from the head office, and that there was no unjust enrichment exception to the act of state doctrine (A8; A10-A11; A13-A14).

B. Statement of Facts

1. *FNB Boston and the Operation of its Cuban Branches*

FNB Boston, which operates foreign branch banks throughout the world, is a national banking association organized under the laws of the United States with its head office in Boston, Massachusetts. Petitioner BBI, which is a wholly-owned Edge Act subsidiary of FNB Boston and the assignee of its claims in this action, has its principal offices in New York City.*

In 1923, pursuant to Section 25 of the Federal Reserve Act, 12 U.S.C. §§ 601-604, FNB Boston established a branch office in Havana, Cuba, and subsequently established five Cuban sub-branches (the "Cuban Branches"). The Cuban Branches thereafter engaged in general banking operations until September 17, 1960, when they were expropriated by the Cuban Government.

The Cuban Branches were operated in a manner typical of foreign branch operations generally. As the District Court found, the Cuban Branches enjoyed substantial operating autonomy, and were operated as a separate enterprise for bookkeeping purposes (A27). In this regard, as required by Section 25 of the Federal Reserve Act, 12 U.S.C. § 604, and by Cuban law, the Cuban Branches maintained a completely independent set of accounting records.** The

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* The District Court, upon removal, had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 12 U.S.C. § 632.

** By contrast, the domestic branches of FNB Boston did not keep separate books of account.

Cuban Government moreover treated the Cuban Branches as entities distinct and independent of their head office in Boston for purposes of bank regulation and taxes. In short, the Cuban Branches were regarded by the Cuban Government as a Cuban bank.

On a regular and ongoing basis, the Cuban Branches engaged in a broad range of commercial banking transactions with banks in the United States and elsewhere. These transactions included the issuance of documentary letters of credit, the collection of commercial paper, the collection and payment of checks, the negotiation of drafts and bills of exchange, the execution of payment orders, and other transactions common to a bank engaged in the support of international commerce.

In keeping with sound banking practice, when the Cuban Branches engaged in commercial transactions with FNB Boston, its other foreign branches or its banking affiliates, such as BBI, they followed the same procedures that were followed when dealing with legally separate and independent banks. Similarly, FNB Boston and the Cuban Branches imposed on one another the same charges and commissions that were imposed on other unrelated banks for similar banking transactions. In short, for purposes of international commercial banking transactions carried out between them, the relationship of each to the other was that of a foreign correspondent bank.

While the Cuban Branches were not separately incorporated, as they could not have been under Cuban law, they were required by Cuban law to be separately capitalized (the capital being provided by FNB Boston), and were also required to set aside a reserve for contingencies based on 20% of branch profits. The day-to-day operations of the Cuban Branches were supervised by a Management Group, the members of which were recommended by FNB Boston.

This Group managed the Cuban Branch operations under a broad power of attorney issued by FNB Boston. As indicated above, all of these characteristics are typical of foreign branch operations generally.

2. *The Nationalization Decrees*

On September 17, 1960, pursuant to Resolution No. 2 promulgated under Cuban Law No. 851 of July 6, 1960, the Cuban Government expropriated the Cuban branches of several United States banks, including the Cuban Branches, and assumed all of the "assets, rights and shares, as well as the assets and liabilities" of such branches (A88-A89). Thereafter, pursuant to Cuban Law No. 930, respondent Banco Nacional was designated "as legal successor . . . to the private banks nationalized in pursuance of Law No. 851 of July 6, 1960" and was deemed to be

> "subrogated to all of the property, assets, rights, claims, and to be the successor to all of the obligations peculiar to the banking operations of the institutions incorporated." (A91.)

Banco Nacional, the Cuban central bank, was vested with all the powers of a commercial bank, and was engaged in national and international banking. To effectuate its succession to the operations of the Cuban Branches on September 17, 1960, Banco Nacional appointed an "interventor", who immediately took over the ongoing commercial banking business of the Cuban Branches.

3. *The Letter of Credit Obligations Sued Upon*

For many years prior to expropriation, the Cuban Branches had issued letters of credit for the account of Cuban importers of United States merchandise. These letters of credit carried the irrevocable obligation of the issuing Cuban Branch to the United States beneficiary to pay up to the face amount of the credit against presentation

to a designated foreign correspondent bank, including from time to time FNB Boston or BBI, of documents conforming to the terms of each such letter of credit.*

All credit evaluations were done by the Cuban Branches,** and, as would be the case with a totally unrelated confirming bank, FNB Boston's first contact with any given transaction would be its receipt of the original letter of credit in Boston, together with a request for confirmation. FNB Boston would then confirm the letter of credit to the United States exporter, as it would in the ordinary course for an unrelated foreign correspondent bank, and charge a fee to the Cuban Branch issuer for so doing. Upon presentation of conforming documents to FNB Boston or BBI, the United States exporter would be paid by FNB Boston, the Cuban Branch account would be debited, and the shipping documents and an advice of debit would be forwarded to Cuba. Upon receipt of the shipping documents by the Cuban Branches, the peso account of the Cuban customer for whose account the letter of credit had been issued would be debited, and the Cuban Branches would reimburse FNB Boston for the amount it had paid the exporter.

Among the "liabilities" or "obligations peculiar to the banking operations" of the Cuban Branches outstanding on September 17, 1960 were those arising under 324 letters

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* The letters of credit were expressly made subject to the Uniform Customs and Practice for Commercial Documentary Credits (ICC Brochure No. 151) (1951 Revision), and were issued, confirmed and processed pursuant thereto. The express undertaking by the issuing bank in favor of the beneficiary, and the corresponding undertaking to reimburse the confirming bank, are set forth in Articles 5 and 10, respectively, of the Uniform Customs and Practice (A103-A104). *See generally,* H. Harfield, Bank Credits and Acceptances, 31-38, 41-55, 261 (5th ed. 1974).

** In respect of most of the letters of credit, the Cuban customers were required to place pesos on deposit with the Cuban Branches as collateral for payment of the letters of credit.

of credit that had been issued by the Cuban Branches during the months prior to nationalization in favor of United States exporters of merchandise to Cuba. Payments totalling $1,675,748.71 were made by FNB Boston to the United States exporters pursuant to its confirmation of all 324 credits. The merchandise shipped under the letters of credit by the United States exporters was received by the Cuban importers in every instance. Banco Nacional received and kept the payments made to it by the Cuban importers in the amount of $1,675,748.71. It has failed to reimburse FNB Boston for any part of this amount.

Reasons for Granting the Writ

POINT I

National Banks and Their Foreign Branches Must Be Treated as Separate Entities for Purposes of Arm's Length Commercial Transactions Between Them.

The Court of Appeals has decided an important question of federal law in this case relating to the status of foreign branches of national banks that should be reviewed by this Court.

Proceeding from its conclusion that "federal law regards a national bank and its branches as a single entity" (A12), the Court of Appeals went on to hold that

> "[s]ince Boston and its branches were not distinct entities, *any obligations of one to the other were not matters of substance but,* as the district court concluded, *merely matters of internal bookkeeping.* There were, therefore, no liabilities of Branches to Boston for Banco Nacional to assume." (A13; emphasis added.)

The Court of Appeals' conclusion that "obligations of one to the other were not matters of substance" disregards

not only the practical import of the basic federal statute providing for the establishment of foreign branches by national banks, and prior judicial construction of that statute, but long-established banking practice and economic reality as well. For virtually every economic and regulatory purpose, claims between United States banks and their foreign offices have always been treated precisely the same way as claims between unrelated foreign banks: this is no more than a recognition that for virtually all practical purposes they are the same.*

By holding that a payment of funds to or for the account of a bank's foreign branch does not give rise to a legally cognizable liability, the Court has extinguished not only

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* The Board of Governors of the Federal Reserve System expressly recognizes claims between home offices and their foreign branches as balance sheet liabilities in its official reports. The data incorporated in the Board's official reports are taken in part from the Monthly Report on Foreign Branch Assets and Liabilities, FR 2502, which all foreign branches of national banks are required by law to file with the Board. Included in the breakdown of foreign branch *liabilities* are line items for liabilities owed to the "Parent Bank," "Other foreign branches of parent bank in the same country," and "Other foreign branches of parent bank in other countries." Liabilities due the parent bank are defined to include

> "the liability of the branch to the parent bank resulting from acceptances confirmed, endorsed, or created by the parent for the branch . . . , as well as the permanent investment of the parent bank in the branch."

In March 1981, for example, the Board reported that U.S. home office claims on foreign branches aggregated more than $43 billion, and that corresponding claims by foreign branches on their U.S. home offices aggregated more than $77 billion. 67 Fed. Res. Bull. A54-A55 (July 1981).

For purposes of computing the U.S. balance of payments, the foreign branch of a domestic bank is likewise regarded as a separate economic entity, and transfers effected between the branch and its home office are treated as equivalent to transfers between entities that are legally distinct. International Monetary Fund, Balance of Payments Manual 7-10, 22-23 (4th ed. 1977).

the "bookkeeping" entry, but the substance of the economic transaction it reflects. The Court's decision that these claims and liabilities are somehow not "real" has no basis in economic fact or legal precedent and could produce serious adverse consequences for the United States and its banks.*

A. The Decision Below Is Contrary to Statutory and Regulatory Recognition of Foreign Branches as Separate Entities for Certain Purposes

While the decision of the Court of Appeals has broad and unfavorable implications for the conduct of foreign branch operations by national banks generally, its impact on such operations insofar as they involve the financing of exports from the United States through foreign branch letters of credit is clear. By denying a national bank the right to be reimbursed under a letter of credit it has confirmed for the account of one of its foreign branches the Court of Appeals' decision discourages, in an abrupt and emphatic way, the confirming or advising by United States banks of letters of credit issued by their own foreign branches, as opposed to those issued by an unrelated foreign correspondent bank. So read, the Court of Appeals' decision directly undercuts the fundamental purpose for which Section 25 of the Federal Reserve Act was enacted in 1913,

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* The Court of Appeals' premise in this case that "federal law regards a national bank and its branches as a single entity" for *all* purposes has been followed by it in an opinion issued after the decision in this case where it held that the head office of Chase Manhattan Bank was liable for piastre deposits placed with its Saigon branch prior to the 1975 conquest of South Vietnam by the communist regime in Hanoi, and the consequent expropriation of Chase's Saigon branch. The Court of Appeals' holding in that case similarly ignored long-standing precedent, and regulatory treatment afforded foreign branch deposits. *Vishipco Line* v. *The Chase Manhattan Bank, N.A.*, No. 81-7052 (2d Cir., filed Sept. 29, 1981) (*petition for rehearing pending*).

when the Congress first permitted national banks to establish foreign branches.

The stated purpose of Section 25 of the Federal Reserve Act was to permit national banks "[t]o establish branches in foreign countries . . . for the furtherance of the foreign commerce of the United States . . . ." Act of Dec. 23, 1913, c. 6, § 25, 38 Stat. 273, 12 U.S.C. § 601. The absence of an American banking presence abroad was viewed by the Congress not only as an "embarrassment" to the U.S. export trade, which was forced to arrange export financing through foreign banks, principally the banks of London, but as a "severe handicap" to the expansion of the foreign trade of the United States. *See, e.g.*, 50 Cong. Rec. 5087-88 (1913); 50 Cong. Rec. App. 330 (1913). It was generally viewed that the establishment of foreign branch banking by national banks would "greatly stimulate our foreign trade both directly and indirectly." 50 Cong. Rec. 5088 (1913).

While Section 25 was thus enacted to encourage national banks to finance exports abroad through their own foreign branches, principally through acceptance financing and the issuance of foreign branch letters of credit, the Court of Appeals decision places such financing at peril in any number of countries that may be viewed as politically unstable. In order to do business in these countries, United States exporters may again be forced to use foreign banks to arrange their export financing, the very consequence Section 25 was enacted to avoid.

In providing for the establishment of foreign branches, Section 25 of the Federal Reserve Act, 12 U.S.C. § 604, requires that

> "[e]very national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of

> other foreign branches established by it and of its home office . . . ." Act of Dec. 23, 1913, c. 6, § 25, 38 Stat. 273, 12 U.S.C. § 604.

While 12 U.S.C. § 604 cannot be read to mean that a foreign branch has a separate *legal* existence or is a separate corporation, it clearly provides for the establishment of a foreign branch as a separate economic entity. This section also provides a clear statutory basis for recognizing liabilities owed by a foreign branch to its head office when their legal relationship is severed, whether through expropriation or otherwise.

12 U.S.C. § 604 was first construed more than fifty years ago to permit a foreign branch and its head office to be treated as separate entities for the purpose of commercial transactions carried out between them, such as those involving letters of credit. In that case, *Pan-American Bank & Trust Co.* v. *National City Bank of New York*, 6 F.2d 762 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925), which involved a letter of credit issued by the New York office of National City Bank which was negotiated for payment by the Brazilian beneficiary at National City Bank's branch in Rio de Janiero, the Court of Appeals, after first reciting 12 U.S.C. § 604, read it to mean that

> "[a foreign] branch is not a mere 'teller's window'; it is a separate business entity." 6 F.2d at 767.

The Court then analyzed the letter of credit transaction, against the backdrop of 12 U.S.C. § 604, in terms that indicate in unmistakable fashion its treatment of the Rio branch and its head office as separate entities:

> "[T]he Rio branch, in so becoming a holder of the drafts, and then sending them to New York for collection, assumed the same relation to its home office that any other bank or person that had simi-

> larly negotiated the paper would have assumed. In fact, as the evidence shows, the drafts and accompanying documents went from the Rio branch to the New York home office with a demand for credit; i.e., a demand for payment, and payment by the demanded credit was given the branch. *This was just what the cited act of Congress* [*12 U.S.C. § 604*] *in effect requires,* and illustrates the rulings that, in respect of the collection of forwarded paper, branches and a parent bank are to be considered as separate entities." (*Id.;* emphasis added.)*

In this case, the Court of Appeals rejected, in a footnote, its earlier reading of the statute, as well as its analysis and holding, as dictum. In so doing, the Court overturned a construction of 12 U.S.C. § 604—a construction given breath by economic reality and banking practice— that had been relied upon for more than half a century.**

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* The Court went on to make plain that it regarded its treatment of the New York head office and the Rio branch as separate entities to be a prerequisite to its decision:

> "We hold that, under the contract made, the usages of the trade, and Brazilian law, the Rio branch, regarded as an independent purchaser of the drafts, bought a good claim against the City Bank, and that therefore that bank has a good claim against the Pan-American." 6 F.2d at 769.

** *See, e.g., United States* v. *First National City Bank,* 321 F.2d 14, 22-23 (2d Cir. 1963), *rev'd on other grounds,* 379 U.S. 378, 384 (1965); *First National City Bank* v. *IRS,* 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960); *McGrath* v. *Agency of Chartered Bank of India, Australia & China,* 104 F. Supp. 964, 968 (S.D.N.Y. 1952), *aff'd on opinion below,* 201 F.2d 368 (2d Cir. 1953) (Kaufman, D.J.); *McCloskey* v. *Chase Manhattan Bank,* 11 N.Y.2d 936, 228 N.Y.S.2d 825, 183 N.E.2d 227 (1962); *Chrzanowska* v. *Corn Exchange Bank,* 173 A.D. 285, 159 N.Y.S. 385 (1st Dep't 1916), *aff'd,* 225 N.Y. 728, 122 N.E. 877 (1919); *Clinton Trust Co.* v. *Compania Azucarera Central Mabay, S.A.,* 172 Misc. 148, 14 N.Y.S.2d 743 (Sup. Ct. N.Y. Cty.), *aff'd,* 258 A.D. 780, 15 N.Y.S.2d 721 (1st Dep't 1939); *Bluebird Undergarment Corp.* v. *Gomez,* 139 Misc. 742, 249 N.Y.S. 319 (Civ. Ct. N.Y. Cty., 1931).

In rejecting its earlier construction of 12 U.S.C. § 604, which permitted recognition of the claims *inter se* reflected on the books of a national bank and its foreign branches, the Court of Appeals cited with approval language in *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), which characterized 12 U.S.C. § 604 as "nothing more than a bookkeeping statute . . . ." But that case, which involved an attempt to subpoena foreign branch records, did not in any way suggest that a bookkeeping entry which reflects an arm's length commercial banking transaction cannot give rise to a legally cognizable liability. On the contrary, while holding that the separate entity doctrine did not vitiate home office control over the foreign branch, the Court of Appeals in that case expressly recognized the validity of the separate entity doctrine as it applies to foreign branch-home office commercial transactions. 271 F.2d at 619.*

The principal basis for the Court of Appeals' determination that "federal law regards a national bank and its foreign branches as a single entity" was an opinion delivered to

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* "[C]ourts have held that in various commercial transactions between a branch bank and its home office *the rights involved are to be determined as though the branch was acting at arm's length as an independent entity. See Pan-American Bank & Trust Co.* v. *National City Bank*, 6 F.2d 762 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925). But from such doctrine it does not follow that in other situations *not involving an arm's length relationship* the manager of a foreign branch any more than the manager of a domestic branch or, indeed an officer of the home office, is beyond the control of the Board of Directors who appointed him . . . ." 271 F.2d at 619 (emphasis added).

United States v. *First National City Bank*, 321 F.2d 14, 22-23 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378, 384 (1965), which turned on the district court's power as a matter of jurisdiction, is to similar effect.

the Federal Reserve Board in 1917, and a current interpretation issued by the Board to similar effect:

> "A foreign branch established by a national bank is not an independent corporation and the creditors of the branch are general creditors of the parent bank."

Published Interpretations of the Board of Governors of the Federal Reserve System § 5600 (1980); *see also* 3 Fed. Res. Bull. 198, 199 (1917). While both the opinion and the Board's interpretation give recognition to the fact that a national bank and its branches are part of the same legal entity, a matter not disputed here, each addresses only the question of the rights of a branch creditor in the context of a national bank's insolvency, and neither is inconsistent with petitioner's position in this action.

Petitioner's position is not that a foreign branch is in fact an independent corporation or that a foreign branch should be recognized as a legally separate entity for all purposes. Indeed, there would be no need for the doctrine expressed in *Pan-American* and the cases that have followed it, which permits *treating* a foreign branch as a separate entity for commercial transaction purposes, if a foreign branch were in fact legally distinct from its head office for all purposes.* Rather, the separate entity doctrine has evolved, and foreign branches have been regarded as separate entities for arm's length commercial transactions, and for certain regulatory purposes, because, as a matter of banking practice, banks deal with their foreign branches, in the context of commercial transactions carried out in the ordinary course, as if they were separate banks.

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* Operations conducted abroad through a subsidiary do not differ materially from those conducted through a branch. Accordingly, there is no fair reason to recognize a legal liability in one instance and deny it in the other.

In the context of an international banking transaction, a transfer of funds, or a payment made to the beneficiary of a letter of credit in anticipation of reimbursement from an issuing bank in the ordinary course, is no less real because the transferee of the funds, or the party from which reimbursement is due, is the foreign branch of the United States confirming bank instead of an unrelated foreign correspondent bank. In either case, the banks participating in the transaction have an account relationship and the fund transfers are reflected on the books of each bank in debit or credit entries that correspond to the economic value of the transactions. In essence, by establishing a foreign branch, a bank does no more than place a related correspondent bank in the foreign jurisdiction in question.*

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* As further evidence of its efforts to accomplish the policy objective underlying Section 25 of the Federal Reserve Act of promoting the development of the United States export trade through foreign branch banking, Congress has provided for foreign branches to be regulated in a way different from their United States head offices so as to allow such branches to compete on an equal footing with foreign banks operating in such foreign jurisdictions that are not subject to U.S. regulatory restrictions. *See* S. Rep. No. 738, 87th Cong., 1st Sess. 2 (1961).

12 U.S.C. § 604(a) empowers the Board in this regard to prescribe regulations to permit the foreign branches of national banks to exercise, in addition to their general powers,

> "*such further powers as may be usual* in connection with the transaction of the business of banking *in the places where such foreign branch shall transact business.*" (A92-A93; emphasis added.)

Regulation K, adopted by the Board under this statute, expressly allows foreign branches of national banks to engage in transactions that would be unlawful if engaged in by their domestic parents: a foreign branch is permitted, for example, to guarantee its customers' debt and to act as an insurance agent. 12 C.F.R. § 211.3 (1981) (A96). Moreover, foreign branch deposits that are payable *only* at offices outside of the United States are excluded both from the reserve requirements imposed by Regulation D and the interest rate limitations imposed by Regulation Q. 12 C.F.R. § 204.1(c)(5), § 217.0(d) (1981) (A97; A102). *See* 12 C.F.R. § 204.112 (1980).

B. It Is Anomalous Not to Treat Foreign Branches of United States Banks as Separate Entities When Domestic Branches of Foreign Banks Are So Treated

The International Banking Act of 1978, 12 U.S.C. § 3101 *et seq.* (the "IBA"), which provides for the establishment of federal branches in the United States by foreign banks, gives express effect to the separate entity doctrine in several respects.

Like 12 U.S.C. § 604, section 3102(b) of the IBA first requires that any federal branch or agency of a foreign bank maintain "branch and agency accounts separate from those of the parent bank." Federal branch operations are entitled under this section to the same "rights and privileges" and are subject to the same "duties, restrictions, conditions and limitations" as a national bank at the same location (A94).

The treatment of a federal branch as a separate entity is given express effect in the context of a branch liquidation. Section 4 of the IBA, 12 U.S.C. § 3102(j)(2)(A), expressly incorporates the separate entity doctrine by preventing creditors of the foreign bank from asserting any claims against the branch which have no relation to transactions with the branch itself: claims are disallowed

> "that would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate legal entity." (Emphasis added; A95.)

The language of Subsection (B) of 12 U.S.C. § 3102(j)(2) then gives express statutory recognition to "amounts due and other liabilities to other offices or branches of . . . [the] foreign bank" by requiring the branch liquidator to return to the head office of the foreign bank the balance remaining after satisfaction of all claims against the branch (A95-A96).

In enacting the IBA the Congress had before it a detailed analysis of state regulation of foreign banking in the context of which United States branches of foreign banks are in fact treated as separate entities, and it incorporated such treatment into the Act.* If the Court of Appeals' decision is allowed to stand, the foreign branches of United States banks will for the first time be treated in a way quite different from the treatment now afforded the United States branches of foreign banks.**

When it is recognized (1) that a transaction by a United States bank carried out with its foreign branch has the same economic characteristics as a similar transaction carried out with an unrelated foreign correspondent bank, and (2) that federal and state legislation expressly treat United States branches of foreign banks as separate entities for the purpose, among others, of recognizing branch liabilities to their foreign head offices, it makes neither economic nor logical sense to hold that a foreign branch of a United States bank cannot be treated as a separate entity for the purpose of asserting a commercial claim against the successor to all of the liabilities of the branch.

The Court of Appeals was apparently misled by the improbability of a bank's home office suing its branch to con-

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* In general, the IBA was patterned after the statutes regulating foreign banking previously adopted by New York, Illinois and California. *Compare* 12 U.S.C. § 1302(j)(2) *with* N.Y. Banking Law § 606-4(a). Before the Congress in its deliberations was an extensive analysis of the statutory schemes in these jurisdictions, which provided for treatment of the domestic branches of foreign banks *"as if they were separately incorporated subsidiaries."* (Emphasis added.) *Foreign Bank Act of 1975: Hearings on S. 958 Before Sub-Comm. on Financial Institutions of Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 1st Sess. 22-23 (1975).

** Other Federal agencies similarly permit treatment of the domestic branches of foreign banks as separate entities. *See, e.g., In re Societe Generale,* 1981 Fed. Sec. L. Rep. ¶ 76,775, at 77,154.

clude that the economic value of the claims that exist between them cannot be legally recognized. While it may be that a suit by a home office against its foreign branch is unrealistic as long as the home office, by exercising its legal control over the branch, can require it to recognize a transaction liability incurred in the ordinary course, it is equally unrealistic to conclude that a liability which duly reflects a bona fide banking transaction cannot be legally recognized at a point when the home office's legal relationship with its branch has been severed. Indeed, the question does not even arise until a third party, by expropriation or otherwise, takes over the branch, including all its assets and liabilities, and refuses to acknowledge any liabilities to the former home office of the expropriated branch.

POINT II

The Court of Appeals' Holding That the Quasi-Contract Claims in This Case Are Barred by the Act of State Doctrine Is in Conflict With This Court's Decision in Dunhill.

The Court of Appeals, without referring to the language in the expropriation decrees pursuant to which Banco Nacional assumed the "liabilities" and the "obligations peculiar to the banking operations" of the expropriated Cuban Branches (A8; A14), characterized the District Court's opinion as creating an unjust enrichment exception to the act of state doctrine, and held that FNB Boston's reimbursement claims had been repudiated in effect by the confiscation of the Cuban Branch assets (A14-A15).* The District Court did not, however, create any unjust enrich-

* The Court of Appeals found an act of state sufficient to vitiate the reimbursement obligation under the letters of credit from the confiscation of the Cuban Branch assets on September 17, 1960. The

(footnote continued on following page)

ment exception to the act of state doctrine; it simply held that the proof was insufficient to establish an act of state repudiation of the quasi-contractual obligation created under the facts of this case (A30).

The District Court relied on basic principles of equity, recognized at common law in the context of letter of credit transactions, to find that Banco Nacional, having succeeded to the rights of the issuing Cuban Branches under the letters of credit, was obligated in quasi-contract to reimburse FNB Boston for the payments it had made thereunder for the account of the Cuban Branches (A24-A25).* Hav-

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indispensable premise of the Court of Appeals' decision in this regard is that, by the act of expropriation of the Cuban Branch assets on that date, Banco Nacional was immediately entitled to claim the amounts deposited with the Cuban Branches by the Cuban importers for whose account the letters of credit were issued. But on that date the Cuban Branches had no right to those funds, which were deposited, not as payment for the issuance of the letters of credit, but as collateral for the payment of such credits in the event conditions written into the letters of credit were met.

Any collateral amounts on deposit, therefore, constituted deposit debts (or liabilities) of the Cuban Branches to the Cuban importer-depositors, and not Cuban Branch assets subject to expropriation. Accordingly, Banco Nacional was not entitled to receive such proceeds until either the terms of the letters of credit had been met, or, under the arrangements developed by the interventor, until the Cuban importers had received their goods. Only at that point, which occurred under the 324 letters of credit at various dates between September 17 and November 23, 1960, did it become entitled to collect the proceeds as its own, and it is at that very point that its reimbursement obligation in favor of FNB Boston arose in the chain of payments characterized by a letter of credit transaction: in such transactions banks use their own funds to honor their independent obligations under letters of credit they have issued or confirmed.

* Equitable principles have long been recognized as forming the doctrinal basis for the right of a confirming bank in a letter of credit transaction to recover from the issuing bank in the absence of an express agreement. *See, e.g., Pan-American Bank & Trust Co.* v. *National City Bank of New York*, 6 F.2d 762, 766 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925); H. Finkelstein, Legal Aspects of Commercial Documentary Letters of Credit 162 (1930) (in the absence of an express agreement, a confirming bank has an action against the issuer in "general assumpsit").

ing found an obligation on the part of Banco Nacional to reimburse FNB Boston arising in quasi-contract, the District Court then rejected the claim of Banco Nacional, which was first asserted on the eve of trial more than ten years after the complaint was filed, that its obligation to reimburse was repudiated either by terms of the expropriation decrees, or by its failure to pay on request:

> "The only evidence of the repudiation of the claim [for reimbursement] is its non-payment. There is nothing cited to this Court in any Cuban statute or decree which would prevent Banco Nacional, having assumed the customer side of the letter of credit transactions, from honoring its obligations to the confirming bank which paid the beneficiaries. *Indeed, the whole thrust of the Cuban statutory scheme for undertaking the continued operation of these banks is, on its face, otherwise.*" (A30; emphasis added.)

Having found no statutory or other affirmative repudiation of the reimbursement obligation, the District Court relied on this Court's opinion in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682 (1976), to hold that the mere failure of a foreign sovereign to honor a legal obligation does not constitute an act of state (*ibid.*).*

In short, the District Court found that Banco Nacional had failed to meet its burden of proving an act of state that met the test imposed by this Court in *Dunhill,* as counsel for Banco Nacional conceded in effect at trial in 1972:

> "The Court: Here you claim a more affirmative act [than was alleged before the same District Court in *Dunhill*], do you?

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* The claims in *Dunhill* likewise arose in quasi-contract when payments were mistakenly made to the interventor there. 425 U.S. at 688-89.

> Mr. Rabinowitz: I am not sure I do, but I claim a repudiation . . . . I don't have a more explicit order or direction of the bank saying: Hereafter we will not pay out on letters of credit. If such an order or resolution exists, I have not been able to find it."*

This Court's decision in *Dunhill* rested in part on policy considerations rooted in the Court's suspicion that the act of state claim in that case was no more than a litigating position to be accorded no weight. In criticizing the dissent's willingness to infer an act of state from the mere nonpayment of an unacknowledged obligation, the Court stated that the interventors' contention that the 'refusal to acquiesce in the quasi-contractual obligation' was an act of state

> "is incorrect because . . . [the interventors] have never admitted an obligation to Dunhill and therefore their failure to repay Dunhill, without more, is inadequate to establish a sovereign repudiation of such an obligation." 425 U.S. at 691-92 n.8.

This analysis is particularly appropriate here, where Banco Nacional has denied the *existence* of any obligation from the outset of this litigation in 1961, where its counsel is unable to point to any affirmative act of repudiation, and where, under the plain language found in the expropriation legislation of the Republic of Cuba, Banco Nacional assumed rather than repudiated the commercial banking obligations in question.

Under the reading of the Cuban expropriation decrees adopted by the Court of Appeals, the language pursuant to which Banco Nacional purportedly assumed the "lia-

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* Banco Nacional's expert in Cuban law conceded at trial that, if a reimbursement liability existed in favor of FNB Boston, such a liability was assumed by Banco Nacional under the express terms of the expropriation decrees.

bilities" and "obligations peculiar to the banking operations" of the Cuban Branches is deprived of substantive meaning. Such a reading of the Cuban expropriation statute, by relieving the proponent of an act of state from its burden of proving an affirmative repudiation, is in direct conflict with this Court's decision in *Dunhill*.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the within Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Dated: New York, New York
November 25, 1981

Respectfully submitted,

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Appendix

81-982

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 166—September Term, 1980

(Argued January 26, 1981 Decided August 4, 1981)

Docket No. 80-7299

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Plaintiff-Appellee,

—v.—

BANCO NACIONAL DE CUBA,

Defendant-Appellant.

Before:

LUMBARD, VAN GRAAFEILAND, and KEARSE,

Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* awarding plaintiff $1,675,749, plus interest, for unreimbursed payments made on letters of credit, and dismissing defendant's counterclaim. Affirmed in part, reversed in part.

VICTOR RABINOWITZ, New York, New York (Michael Krinsky, Judith Levin, Ellen Winner, Jules Lobel, Susan Davis (Third Year Law Student), Rabinowitz, Boudin, Standard, Krinsky, & Lieberman, New York, New York, on the brief), *for Defendant-Appellant.*

ROBERT B. FISKE, JR., New York, New York, (James W. B. Benkard, James L. Kerr, Davis Polk & Wardwell, New York, New York, on the brief), *for Plaintiff-Appellee.*

KEARSE, *Circuit Judge*:

This is one of six appeals decided today in cases arising out of expropriations of property of American companies by the Republic of Cuba in 1960.[1] In the present action,[2] plaintiff-appellee First National Bank of Boston (International) ("BBI") brought suit as assignee of First National Bank of Boston ("Boston") against Banco Nacional de Cuba ("Banco Nacional") to recover $1,675,749 for letters of credit paid by Boston for which it was not reimbursed. The letters of credit were issued by Boston's Cuban branches ("Branches") before the Branches were expropriated by Cuba; some were paid by Boston before the

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[1] The other five cases are *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, Nos. 80-7375, -7377; *Banco Para El Comercio Exterior de Cuba* v. *First National City Bank*, No. 80-7297; *Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, No. 80-7209; *Banco Nacional de Cuba* v. *Irving Trust Co.*, No. 80-7205; and *Banco Nacional de Cuba* v. *Manufacturers Trust Co.*, No. 80-7215. The last three cases were argued together and decided in a single opinion.

[2] Suit was commenced in the Supreme Court of the State of New York, New York County, and was removed to federal court pursuant to 28 U.S.C. §§ 1331, 1332, and 1441 (1976).

expropriation; the bulk were paid afterwards. Banco Nacional denied liability and counterclaimed to recover $58,461 deposited with Boston by Banco Nacional, plus $500 deposited with Boston by a bank to which Banco Nacional is successor, which sums Boston had refused to repay. The United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge*, rejected all of Banco Nacional's defenses and counterclaims and entered judgment in favor of BBI in the amount requested.

For the reasons below we reverse the judgment insofar as it allowed BBI to recover on its claims, and we affirm insofar as it dismissed Banco Nacional's counterclaim.

I.

The events surrounding the Cuban revolution, which resulted in the installation of the revolutionary government on January 1, 1959, have been much discussed in the courts. We assume familiarity with our decision today in *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, Nos. 80-7375, -7377 ("*Chase*"), and with the cases cited in the margin.[3]

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[3] *See, e.g., Banco Nacional de Cuba* v. *First National City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019 (1971), *on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759 (1972), *on remand*, 478 F.2d 191 (2d Cir. 1973) ("Banco I"); *Banco Nacional de Cuba* v. *Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964), *on remand, sub nom. Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

A. *The Parties and Their Progenitors*

Plaintiff BBI is a wholly-owned Edge Act[4] subsidiary of Boston, the assignor of the claims BBI asserts. Boston is a national banking association organized under the laws of the United States; its principal office is in Boston, Massachusetts. In 1923 Boston established a branch in Cuba, and in 1960 it had that branch and five "sub-branches" operating there.

The Branches were organized under 12 U.S.C. § 601 et seq. (1976) as unincorporated foreign branches of Boston and operated under Boston's name; the name on the Cuban offices was simply the Spanish equivalent of "First National Bank of Boston, organized [or founded] in 1789." The Branches were capitalized by Boston's investment of $3,000,000 in the form of United States government bonds, which remained in the name of Boston; the interest earned on them was credited to the Branches. Branches had no president or board of directors. Their day-to-day operations were supervised by a "Management Group," which hired all officers for the Cuban operations. The members of the Management Group were recommended by Boston. Branches kept their own books of record, paid Cuban taxes, and remitted their profits to Boston, which included these profits in their own annual reports and paid United States taxes on them.

Banco Nacional, as set forth in greater detail in *Chase, supra,* is the central bank of Cuba. It was organized in 1948 by the Republic of Cuba to operate as a separate and autonomous juridical entity. Prior to the revolution one-half of its stock was owned by the Cuban government

[4] The Edge Act, 12 U.S.C. §§ 611-632 (1976), governs the organization of corporations to conduct foreign banking.

(which appointed its president and three of its five directors), with the remaining one-half owned, as required by Cuban law, by the private banks operating in Cuba. Since prior to the Cuban revolution Banco Nacional has engaged in domestic and international banking, has been the sole depository of state funds, and has had extensive powers to control and protect the Cuban currency in international trade. Prior to October 13, 1960 it regulated all private commercial banks operating in Cuba. After that date there were no private banks, and Banco Nacional was wholly-owned by the Cuban government.

B. *The Letter of Credit Transactions*

Prior to the expropriations, Branches regularly engaged in the issuance of letters of credit to Cuban importers seeking to purchase foreign goods. The usual letter of credit transaction had several stages. First, a Cuban customer applied to Branches for a letter of credit; accompanying this application would be an application for an import license. If a Branches officer approved the letter of credit application, he would send the import license application to Banco Nacional's foreign exchange control department, where it was reviewed on behalf of the Cuban Currency Stabilization Fund, which controlled foreign payments by Cuban businesses. If Banco Nacional approved the license application, it would send the import license to Branches. Following further review by Branches of the letter of credit application, Branches would send both the license and the letter of credit application to Banco Nacional for a final review. Final approval was given by Banco Nacional in every case in which initial approval had been given, and the papers were returned to Branches. In most cases the Cuban buyer was required to deposit Cuban pesos with

Branches before the letter of credit would issue. When the pesos were deposited, Branches would issue the letter of credit and send it to Boston; Boston would confirm the credit and send the confirmation and the letter of credit to the seller. After the seller had shipped the goods to the Cuban buyer, he would present his confirmed letter of credit, along with the shipping documents, to Boston and receive payment from it in U.S. dollars. On any letter of credit issued by Branches and paid by Boston, Boston charged the amount paid against Branches' account. Branches replenished their account daily by purchasing U.S. dollars from Banco Nacional with pesos received from its Cuban letter of credit customers, and sending the dollars to Boston.

At issue in the present action are 324 letters of credit that were issued by Branches, approved by Banco Nacional, and confirmed by Boston prior to September 17, 1960. A small number of these, totaling $177,282, were paid by Boston prior to that date; the great bulk of them, totaling $1,498,466, were paid by Boston between September 17 and November 23, 1960. Between September 17 and November 23, Boston requested, but did not receive, assurances from Banco Nacional that Boston would be reimbursed for these payments. In an effort to ensure reimbursement, Boston withheld from the Cuban buyers the shipping documents that they ordinarily would have needed in order to obtain possession of the goods. This effort was thwarted, however, since Banco Nacional intervened to procure the release of the goods without the usual documentation.

C. *The Expropriation*

On July 6, 1960, following the deterioration of relations between Cuba and the United States, Cuba enacted

Law No. 851 which, inter alia, authorized officials of the Republic to "proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America . . . ."[5] On September 17, 1960, Resolution No. 2 pursuant to Law No. 851 expropriated and nationalized all of Boston's Cuban branches, and placed Banco Nacional in charge. The Resolution read in part as follows:

We Resolve:

First: To order the nationalization, by expropriation, and, consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1—The First National City Bank of New York

2—The First National Bank of Boston

3—The Chase Manhattan Bank

Second: Consequently, the Cuban Government is substituted for the legal persons named in the foregoing paragraph as to the aforesaid assets, rights and shares, as well as the assets and liabilities of the aforementioned companies.

* * *

[5] The translations of Law No. 851 provided by the parties in *Chase, supra,* and *Banco Para El Comercio Exterior de Cuba, supra,* note 1, respectively, differ somewhat from that provided in the present case, as well as from each other.

> Fourth: . . . the President of the National Bank of Cuba is assigned to take over, with all the authority inherent in his office, the administration of the assets and banking businesses which are the subject of the action decreed in the present Resolution.

On September 17, 1960, Banco Nacional took physical possession and control of Branches' assets and operations. It has not reimbursed Boston for any of the 324 letter of credit payments.

Following the expropriation Boston collected from various sources a total of $941,470 in the Branches' account, representing funds received from Banco Nacional in September 1970, the proceeds of a number of "bought bills" belonging to Branches, and Branches' correspondent balance with other banks.

D. *The Present Lawsuit*

BBI, as assignee, brought the present lawsuit to recover $1,675,749, the total of Boston's unreimbursed payments on the letters of credit. As BBI's claim progressed from the complaint stage to the trial stage, essentially two supporting theories evolved. First, BBI contended that the Branches were liable to Boston for the letters of credit, and that pursuant to Resolution No. 2 Banco Nacional had assumed all liabilities of Branches. Second, BBI contended that Banco Nacional had breached a contract "implied in fact" on the basis of the prior course of dealings and representations of a senior official of Banco Nacional.

Banco Nacional answered BBI's complaint principally by denying that it had assumed Branches' obligations, denying that it had failed to make any payments to Boston with respect to the letters of credit, and generally denying all liability. It asserted counterclaims against BBI to recover more than $58,000 in deposits, which Boston

asserted it had retained to offset losses resulting from the expropriation of the Branches. On the day of trial Banco Nacional was permitted to amend its answer to assert that adjudication of BBI's claim was barred by the act of state doctrine. In addition, Banco Nacional has argued that any amount recoverable by BBI should be reduced by the $941,470 accumulated by Boston in Branches' account following the expropriation.

E. *The District Court's Decision*

A bench trial was held before Judge Frederick van Pelt Bryan, who died before a decision could be rendered. Thereafter the case was reassigned to Judge Brieant, who, with the consent of the parties, rendered a decision on the basis of the record made before Judge Bryan.

Judge Brieant rejected both of the theories on which BBI's complaint was based. He found that there was no contract "implied in fact," a finding not challenged here by BBI. In addition, he found that because Boston and Branches were not separate and distinct entities there could be no debt owing from Branches to Boston, and hence no liability for Banco Nacional to assume upon nationalization of the Branches. Nevertheless, the district judge ruled in favor of BBI, relying on a theory of unjust enrichment. He stated that, since Banco Nacional succeeded to Branches' assets, it

> became entitled to and did collect the avails of the customers' side of the letter of credit transactions in pesos in Cuba, while BBI in New York, or Boston, in Massachusetts, were required to and did, pay the beneficiaries' side of the transactions in dollars. Thereby, as the successor of the Branches, Banco Nacional became obligated in *quasi* contract to pay

> Boston or BBI for having accepted the burdens of these transactions, inasmuch as it had derived the benefit.

Opinion at 8.

The district court rejected both Banco Nacional's formally pleaded counterclaims and its contention that the $941,470 collected by Boston for Branches' account should reduce the amount of any recovery by BBI. The court found that prior to the lawsuit Banco Nacional had not given instructions to Boston as to the purpose of any payment from Banco Nacional, and that in these circumstances Boston was entitled to set off these amounts against its losses from the expropriation of Branches rather than against its losses on the letter of credit transactions.

II. BBI'S CLAIM

On this appeal Banco Nacional argues principally that the judgment against it should be reversed because the act of state doctrine bars BBI's recovery and because Banco Nacional is not subject to the jurisdiction of the court under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 (1976). BBI, for its part, contends that the district court's ruling that Banco Nacional is liable for unjust enrichment is correct, and that in any event the judgment may be upheld on the ground that Banco Nacional is expressly obligated to Boston under the terms of Resolution No. 2.

We find no error in Judge Brieant's ruling that Boston and Branches were not separate entities and we therefore concur in his rejection of the proposition that Banco Nacional assumed liabilities of Branches to Boston. We must reject, however, his conclusion that Banco Nacional

is liable on a quasi contract, or unjust enrichment, theory since we find recovery on such a basis barred by the act of state doctrine.[6]

A. *The Assumption of Liability Theory*

An indispensable premise of BBI's contention that Banco Nacional assumed Branches' obligations to Boston is that Branches and Boston were separate entities. The district court properly rejected this proposition in light of the legal framework within which Branches was created and the facts surrounding the Boston-Branches operation.

Boston's Branches were organized under the Federal Foreign Banking Law, 12 U.S.C. §§ 601-04, 611-32 (1976). Under this statute the Branches were not, and could not lawfully have been, organized as separate corporations. 12 U.S.C. §§ 601, 603. Although foreign branches maintain separate books of account pursuant to 12 U.S.C. § 604, that section "is nothing more than a 'bookkeeping' statute, designed to make examination into the financial condition of national banks, particularly the foreign operations of such banks, as simple as possible." *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960). Given the federal statutory scheme, federal agencies and officials have long viewed a national bank and its branches as a single entity. For example, in 1917, counsel to the Federal Reserve Bank gave an opinion to the Governors of the Federal Reserve Board as follows:

> There is nothing in this language [12 U.S.C. § 601-604] to indicate that branches established in foreign

[6] We therefore need not reach the Foreign Sovereign Immunities Act defense, which was rejected by the district court on its merits and which BBI contends is, in any event untimely.

> countries are to have a separate existence and constitute separate corporations. On the contrary, it is clear that the parent bank is merely to engage in certain foreign transactions through its foreign branch. This view is substantiated by the fact that the profit and loss accruing to each bank is to be entered on the general ledger of the parent bank at the end of each fiscal year.

3 Federal Reserve Bulletin 198, 199 (1917). And a current interpretation by the Federal Reserve Board reads as follows:

> Identity of foreign branches with parent bank.—A foreign branch established by a national bank is not an independent corporation and the creditors of the branch are general creditors of the parent bank. . . .

Published Interpretations of the Board of Governors of the Federal Reserve System § 5600 (1980). *Cf. also United States* v. *First National City Bank*, 379 U.S. 378 (1965), holding that a suit against a national bank gave the court jurisdiction to require that actions be taken by its foreign branch, and stating that a national bank "has actual, practical control over its [foreign] branches; it is organized under a federal statute, 12 U.S.C. § 24, which authorizes it 'To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons'—as one entity, not branch by branch." *Id.* at 384. Thus, federal law regards a national bank and its branches as a single entity.[7]

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[7] We do not regard *Pan-American Bank & Trust Company* v. *National City Bank*, 6 F.2d 762 (2d Cir. 1925), as requiring a different conclusion. The case involved a letter of credit issued by National City Bank ("Citibank"), which was paid in Brazil by its Rio de Janeiro branch. When the purchaser of the letter of credit

(footnote continued on following page)

Within this legal framework, the district court found that while Branches had some operating autonomy, they were never considered to be nor held out to be an entity separate from Boston. There is evidence to support these findings, including the facts that Branches were capitalized with $3,000,000 in bonds that remained in Boston's name, that Branches' Management Group were recommended by Boston, that Boston paid U.S. taxes on Branches' profits, and that Branches operated under the style, "First National Bank of Boston, founded in 1789." We cannot say that the finding that Boston and its Branches were a single entity is clearly erroneous.

Since Boston and its Branches were not distinct entities, any obligations of one to the other were not matters of substance but, as the district court concluded, merely matters of internal bookkeeping. There were, therefore, no liabilities of Branches to Boston for Banco Nacional to assume.

B. *The Unjust Enrichment Theory*

The basis on which the district court upheld BBI's claims was that when Banco Nacional took over the pesos de-

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refused to pay Citibank, Citibank sued. BBI relies on various language in the majority opinion that appears to have no relation to the facts or outcome of the case. To the extent, for example, that the majority opinion suggests that the Brazilian branch of Citibank could have sued Citibank, *id.* at 769, it surely was dictum, since no such suit was attempted. And the language suggesting that Citibank and its branch were separate entities, *id.* at 767—which BBI argues was needed to deal with a defense that the branch's payment would not have conformed to New York law—seems to have been immaterial to the outcome of the case, since the court went on to note that the branch's payment in Brazil had been in conformity with the law, usage, and trade of Brazil, *id.* at 769. In any event there is no reason in law or logic why the same entity cannot be both the issuing and the paying bank in a letter of credit transaction, *see* H. Harfield, Letters of Credit 9-11 (1979).

posited with Branches by the Cuban purchasers of the letters of credit, leaving Boston to pay the beneficiaries of those letters, Banco Nacional was unjustly enriched:

> Banco Nacional . . . took over the going business being conducted in Cuba by [Branches], and receiving the avails, became liable in *quasi* contract for the countervailing burdens of the transactions.

Opinion at 14. This view cannot be sustained.

As a general matter the act of state doctrine bars courts from examining the validity of an expropriation of property by a foreign sovereign in its own territory. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *see Chase, supra.* There is no question here that Banco Nacional, acting as an alter ego of the Cuban government, *see Chase, supra; Banco Nacional de Cuba* v. *First National City Bank*, 478 F.2d 191, 193-94 (2d Cir. 1973), succeeded to the Branches' assets through an act of "nationalization through forced expropriation" pursuant to a Law and a Resolution of the Cuban government. Given these facts, we see no basis for refusing to apply the act of state doctrine to bar BBI's present claims. As we stated in *Menendez* v. *Saks & Company*, 485 F.2d 1355 (2d Cir. 1973) ("*Menendez*"), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976) ("*Alfred Dunhill*"),

> [n]o authority has been cited for the proposition that the act of state doctrine does not apply to a quasi-contractual claim based on unjust enrichment . . . . Nor has any sound reason been advanced in support of such an exception.

485 F.2d at 1370. Indeed, were there an unjust enrichment exception to the act of state doctrine, we would expect the exception to swallow the rule, for virtually every taking

will enrich the sovereign,[8] and to the extent that compensation is not paid that enrichment will have been unjust. We may not avoid application of the act of state doctrine by simply compartmentalizing the expropriation and narrowing our sights to the precise injustice associated with the taking of a particular asset.

Nor do we find any exception to the doctrine availing to BBI. If there were a "commercial activity doctrine," *see Alfred Dunhill, supra,* 425 U.S. at 695-706 (plurality opinion of Justice White),[9] we would not view it as applicable here since the liability sought to be imposed on Banco Nacional does not arise out of its own commercial activity, but rather results from the pre-expropriation activities of Boston and Branches. All 324 letters of credit were issued by Branches and confirmed by Boston prior to the expropriation. Those that were paid prior to the expropriation obviously were not commercial obligations of Banco Nacional. As to the letters that were paid after the expropriation, the payments were made by Boston with no participation, encouragement, or reassurance—although Boston solicited reassurance as to reimbursement—by Banco National. We do not view Banco Nacional's intercession aiding Cuban buyers to gain possession of the shipped goods without proper documentation as a commercial activity. Nor can we construe as a com-

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[8] For a description of an expropriation that appeared to be economically detrimental to the expropriating state, *see* Lillich, *The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos"?,* in III The Valuation of Nationalized Property in International Law 202 n.98 (Lillich ed. 1975).

[9] In *Menendez,* we declined to hold that the act of state doctrine does not apply to a foreign sovereign's commercial activities. While Part III of Justice White's opinion in *Alfred Dunhill* espoused a commercial activity exception to the doctrine, that portion of the opinion was joined by only four Justices.

mercial activity Banco Nacional's collection of pesos from those few Cuban buyers who had not already paid for their letters of credit. Banco Nacional obtained the right to collect those pesos, along with all debts owed Branches, by means of the expropriation. In all, we are at a loss to see what commercial activity of Banco Nacional could have given rise to BBI's claims.

Finally, the decision of the Supreme Court in *First Nacional City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972), does not advance BBI's cause. That case held that the act of state doctrine did not bar adjudication of a counterclaim for expropriation where the Executive Branch of the United States government has advised the courts that it believes the act of state doctrine need not be applied,[10] where there was no showing that adjudication would interfere with delicate foreign relations, and where the amount of the counterclaim did not exceed the value of the sovereign's claim. *See Chase supra.* This exception is obviously not applicable to the present case since the action was initiated not by Banco Nacional but by BBI, and since BBI seeks not merely a setoff against Banco Nacional's claims, but an affirmative award of damages.

We conclude that BBI's claims should have been dismissed on the basis of the act of state doctrine.

III. BANCO NACIONAL'S COUNTERCLAIMS

Finally, we turn to Banco Nacional's counterclaims for recovery of its deposits withheld by Boston. The district court dismissed the counterclaims on the ground that

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[10] Such advice is commonly called a *"Bernstein"* letter after the decision of this court in *Bernstein* v. *N.Y. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 210 F.2d 375 (2d Cir. 1954). We are unaware of any *Bernstein* letter with respect to the present litigation.

Boston had properly applied the funds in Banco Nacional's account to offset Boston's losses from the expropriation of its Cuban assets. We need not reach the merits of this rationale because we conclude that the dismissal of BBI's claims requires the dismissal of Banco Nacional's counterclaims.

When a plaintiff sues on a claim as an assignee, the defendant may assert a counterclaim against the assignee based on a right of action against the assignor; the defendant's recovery on such a counterclaim, however, is limited to the amount of the assignee's recovery. *Marley* v. *United States*, 423 F.2d 324, 338 (Ct. Cl. 1970); *Riverside Park Realty Co.* v. *Federal Deposit Insurance Corp.*, 465 F. Supp. 305, 316 (M.D. Tenn. 1978); *First Acceptance Corp.* v. *Kennedy*, 95 F. Supp. 861, 872 (N.D. Iowa 1951). *Cf.* Restatement (Second) of Judgments § 56, Comment b, Illustration 4 at 62-63 (Tent. Draft No. 1, 1973).

In the present case the plaintiff is BBI, assignee of Boston's claims. Banco Nacional's right of action, asserted in its counterclaims, is against Boston, not BBI. Banco Nacional cannot, therefore, recover more on these counterclaims than BBI recovers against it. Since we have held that BBI's claim must be dismissed, Banco Nacional's claims also must be dismissed.

CONCLUSION

The judgment of the district court is affirmed insofar as it dismissed Banco Nacional's counterclaim, reversed insofar as it granted BBI's claims, and remanded with instructions to dismiss BBI's complaint.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2116-CLB

THE FIRST NATIONAL BANK OF BOSTON (International),

Plaintiff,

—against—

BANCO NACIONAL DE CUBA,

Defendant.

Brieant, J.

Plaintiff First Bank of Boston (International) (hereinafter "BBI"), as assignee of the First National Bank of Boston (hereinafter "Boston"), brings this action to recover sums of money allegedly due and owing to it by defendant Banco Nacional de Cuba (hereinafter "Banco Nacional"), as a result of certain letter of credit transactions which took place in 1960. This case was tried before the Hon. Frederick vanPelt Bryan without a jury on June 12-14 and July 17, 1972, and was reassigned to me following the death of Judge Bryan on April 17, 1978.

Plaintiff commenced this action in the Supreme Court of the State of New York, New York County by summons and complaint dated April 20, 1961. A warrant of attachment was granted, and was levied upon property of defendant in New York State, thus effecting *quasi-in-rem* jurisdiction over defendant.

The complaint alleges two theories by which Banco Nacional is claimed to be liable to BBI for $1,675,748.71 which Boston and BBI paid out on certain letters of credit. First, plaintiff claims that the letter of credit were issued by Boston's branch banks in Cuba (hereinafter for convenience "the Branch Banks", or "the Branch") and that Boston and BBI, in accordance with an agreement between Boston and the Branch, paid out sums of money in the United States when presented with drafts on these letters. Plaintiff further alleges in this first claim that pursuant to Law No. 851 and Resolution No. 2, passed by the Republic of Cuba on September 17, 1960, the Branch Banks were expropriated by the Cuban Government, and that Banco Nacional, which succeeded to the rights and liabilities of the Branch Banks as a going concern pursuant to the aforementioned laws, refused to reimburse Boston for the sums paid on the letters of credit.

Plaintiff's second claim alleges that Banco Nacional was directly liable for the amounts due and owing on the letters of credit by reason of an express or implied contract. Plaintiff contends that an express contract was made when Banco Nacional gave assurances either by express statements or by its prior course of dealing, or both, that it would always provide dollars to reimburse Boston for the amounts paid out on the letters of credit. Thus, plaintiff alleges that: directly, by reason of an express or implied contract; or indirectly, by assuming the debts of the Branch Banks upon nationalization, Banco Nacional is liable for the full amount paid on letters of credit issued by the Branch Banks.

By petition filed on June 14, 1961, defendant removed this action to this Court. It filed an amended answer on August 14, 1961. The amended answer denies that Banco Nacional was liable to Boston for any reason, and sets

forth a counterclaim for money deposited with Boston by Banco Nacional, which Boston refused to repay on demand.

Plaintiff's reply, filed February 13, 1962, asserts two defenses to defendant's counterclaim. First, plaintiff alleges that Banco Nacional owed Boston for additional letters of credit which were not the subject of the complaint, and that Boston applied (*i.e.*, set off) the balance in Banco Nacional's account to satisfy that debt. In its post-trial brief, pp. 75-76, plaintiff has shifted its position, claiming now to have set off against the "value of the nationalized assets of the Cuban Branch" and its pleadings will be deemed amended accordingly. As will be noted *infra*, p. 16, *et seq.*, it is of no significance whether plaintiff set off against the expropriation claim against Cuba, or against unrelated letters of credit transactions not sued on here, or both.

Plaintiff also alleges that defendant's counterclaim concerns a transaction between Banco Nacional and Boston, and therefore defendant's claim can only be asserted as a set off, and cannot be the basis for an affirmative judgment.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).

The following constitute the findings of fact and conclusions of law in this case.

I

Boston is a national bank with its principal place of business in Boston, Massachusetts. In 1923, Boston opened a branch bank in Havana, Cuba, and this became the head office for five sub-branches established thereafter. These banks are collectively referred to herein as the Branch Banks, or the Branch.

In some respects, the Branch Banks were closely aligned with Boston. They were organized under 28 U.S.C. § 601, *et seq.* as foreign branches of Boston, and were capitalized by Boston's investment of three million dollars in the form of U. S. Government Bonds. These bonds were in the name of Boston, but the interest was credited to the Branch Banks. Further, the profits of the Branch Banks were included in Boston's annual report, and the profits and losses appeared on Boston's tax returns.

On the other hand, there was some evidence of the Branch Banks' autonomy. They dealt with a number of foreign and U. S. banks other than Boston, maintained separate account books, and leased or paid for their offices and equipment out of their own operating funds. Although the Branch Banks had no President or Board of Directors, there was a "Management Group" of thirty officers apparently in charge of the daily operations of the Branch Banks. Of this Group, three officers directed any policy decisions that arose, and one of these three, a Mr. Caswell, was given power of attorney by Boston. It should be noted that while Boston recommended people for these Management Group positions, any officers who were hired by the Cuban Branches were chosen by members of the Management Group.

A common commercial transaction regularly engaged in by the Branch Banks was the issuance of letters of credit for Cuban importers seeking foreign goods. There was a standard procedure required for the issuance of all letters of credit by the Branch Banks, and because plaintiff relies on this procedure as evidence supporting its second, or contract claim, it will be described here in detail. The letter of credit transaction began when a Cuban customer presented the Branch Banks with an application for a letter

of credit and for an import license. If the letter of credit application was approved by an officer, the application for an import license was sent by the Branch to the foreign exchange control department of Banco Nacional. That department reviewed the request for an import license on behalf of the Currency Stabilization Fund, which controlled payments to foreign exporters by Cuban businesses. If the license application was granted, an import license was returned to the Branch Banks.

Following further review of the letter of credit application, the Branch Banks then submitted the license and the request for a letter of credit to the exchange control department of Banco Nacional for a final review. Both parties agree that while final approval was occasionally delayed, it was never withheld after a license was granted. However, the parties disagree on the inference to be drawn from these delays.

Plaintiff argues that the proper inference is that final approval was given only when Banco Nacional had sufficient dollars on deposit with which to reimburse the confirming bank on the letter of credit. Defendant argues that there is nothing in the proof to justify such an inference. At any rate, final approval was given in every case in which there was initial approval, and the letter was sent to Boston, which confirmed the credit and forwarded the letter and the confirmation to the beneficiary.

Thereafter, upon shipment of goods to the Cuban customer, the beneficiary presented the confirmed letter and the shipping documents in the United States to Boston or BBI, and received payment or credit. Any amount paid out on these letters of credit was charged by Boston against the Branch Bank's account. To replenish its account with Boston, the Branch purchased dollars from Banco Nacional.

These purchases took place on a daily basis, and these United States funds were sent to Boston to be credited to the Branch Banks' account.

Plaintiff points out that Banco Nacional never failed to make dollars available to the Branch Banks in return for pesos, and also that an officer of Banco Nacional, a Dr. Martin, gave assurances to the Branch Banks that dollars would always be available to reimburse Boston on the letter of credit transactions if the proper procedures outlined above were followed.

Some 324 letters of credit that are the subject of the complaint in this case were issued by the Branch Banks between March 29, 1960 and September 7, 1960. A number of these letters were presented, with shipping documents, to Boston on or before September 16, 1960, and on September 15 and 16, 1960, Boston paid out $177,282.49 to the beneficiaries of these letters, debited the Branch Banks' account, and sent the shipping documents to Cuba.

As noted heretofore, on September 17, 1960, the Government of Cuba expropriated the Branch Banks, pursuant to Law No. 851 and Resolution No. 2, which provided for the nationalization of Cuban properties belonging to the Chase Manhattan Bank, the First National City Bank, and Boston.

Familiarity is assumed with this Court's single decision being filed simultaneously herewith in cases entitled *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 60 Civ. 4663-CLB and *Banco Para el Comercio Exterior de Cuba* v. *First National City Bank*, 61 Civ. 410-CLB, wherein the historical bankground for this seizure, and much of the legal consequences flowing therefrom are discussed. That decision will be referred to below for convenience as the "*Chase-Citibank* decision." To the extent relevant to the

resolution of this action, the findings of fact and conclusions of law therein contained are incorporated by reference.

After September 17, 1960, Boston continued to pay out money to the beneficiaries who presented letters of credit issued by the Branch Banks, and continued to seek assurances from Banco Nacional that reimbursement for these payments would be provided. While awaiting these assurances from Banco Nacional, which never came, Boston, to protect itself, withheld the shipping documents tendered by the beneficiaries. In all, Boston paid out $1,675,000 on letters of credit issued by the Branch Banks. The consignees in Cuba were successful in gaining possession of the goods upon arrival without surrendering the shipping documents.

Defendant claims that this sum must be offset by the money Boston received prior to nationalization, in the Branch Banks' account. This included funds received from Banco Nacional to reimburse the Branch Banks' account, a number of "bought bills" belonging to the Branch Banks, and other money collected by Boston that otherwise would have been credited to the Branch Banks' account. Both parties agree that these funds amounted to $941,470.50. However, plaintiff argues that those recoveries should be set off against the loss of property that Boston sustained when its branches in Cuba were expropriated, and not against the money due and owing for the letter of credit payments sued on here.

A consideration of the letters of credit transactions will demonstrate that as a result of the seizure of the Branch, Banco Nacional became the successor in interest of Boston or BBI with respect to the loans extended or promised by its Branches to the Cuban customers or purchasers of these letters of credit, or payments made for or on account of

the letters. Situs of these claims was and is in Cuba. Most such customers were required to deposit Cuban pesos in the Branch before the letter of credit would issue. Others, presumably, received an open line of credit in pesos from the Branch, to be debited when the letter was confirmed. As a result, Banco Nacional became entitled to and did collect the avails of the customers' side of the letter of credit transactions in pesos in Cuba, while BBI in New York, or Boston, in Massachusetts, were required to and did, pay the beneficiaries' side of the transactions in dollars. Thereby, as the successor of the Branches, Banco Nacional became obligated in *quasi* contract to pay Boston or BBI for having accepted the burdens of these transactions, inasmuch as it had derived the benefit. Similar transactions by Chase and Citibank with respect to letters of credit have been treated in the same way by the Court and are discussed more fully in the *Chase-Citibank* decision. For the reasons more fully disclosed therein, Banco Nacional is liable here to plaintiff.

Apart from the *quasi* contractual obligation of Banco Nacional created by this tripartite transaction, there is in this case an implied contract in fact urged by Boston, arising out of express promises by a high level Cuban official, specifically, Dr. Martin, who was the head of the Exchange Control Department of Banco Nacional. Dr. Martin orally assured Boston's branch managers and other international bankers in Cuba, over a series of luncheons, apparently convened by him in order to assist in maintaining orderly ongoing banking relationships while the Revolutionary Government reorganized the social structure. Ultimately, the banking laws were amended to eliminate private banking in Cuba by foreigners. There is some question whether the oral statements of a Government official

under these circumstances can rise to the level of an express contract, although the record is clear that Boston and others relied on these statements to their financial detriment, and clearly Dr. Martin anticipated that they most likely would do so, and sought to achieve that result.

In addition, Boston relies on a prior course of dealing with Banco Nacional to support its theory that there was an implied contract in fact. Here also plaintiff's proof does not rise to the level of showing an express or implied contract in fact, but there clearly is a contract implied in law or *quasi* contractual liability. Banco Nacional having taken the benefit of the customers' side of these letter of credit transactions, with their benefits payable in pesos, neither Banco Nacional nor the Republic of Cuba should be allowed to leave Boston or BBI holding the corresponding and countervailing burdens of the same transactions. As noted in the *Chase-Citibank* decision, and also in *Banco Nacional* v. *First National City Bank,* 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd,* 442 F.2d 530 (2d Cir. 1971), *rev'd,* 406 U.S. 759 (1972), *on remand,* 478 F.2d 191 (2d Cir. 1973), (*"Banco I"*) it has been adjudicated, and indeed it is obvious, that Banco Nacional and the Government of Cuba are one and the same in law and in fact.

II

BBI has argued that upon nationalization Banco Nacional assumed an obligation or debt which the Branch owed to BBI or the home office. This argument assumes that a debt existed between the Branch and the home office on the date of nationalization, which Banco Nacional could have assumed. Clearly, no such debt can exist if the Branch and

BBI or the home office in Boston are one and the same legal entity. As was remarked by counsel for Banco Nacional in a quotation cited in the *Chase-Citibank* decision, "the branch in Havana could no more be indebted to the head office than the branch [of Chase] on Pine Street could be indebted to the branch on Broadway."

The Boston Branches enjoyed substantial operating autonomy, as did the branches of Chase and Citibank in Cuba. The Branches were operated as a separate enterprise for bookkeeping purposes. They were managed and treated as a separate "profit center," making payments to and receiving payments from the head office. Furthermore, prior to confiscation, the Cuban Government and Banco Nacional treated the Cuban branches as distinct entities independent of their head office for purposes of banking regulation and taxation. The legal organization of Boston's Branches is substantially indistinguishable from the method by which the branches of Chase and Citibank were operated in Cuba, discussed more fully in the *Chase-Citibank* decision, except that Boston had imposed within the relationship the existence of an Edge Act Corporation, Bank of Boston (International) (herein "BBI") which had its principal office in New York. See generally, 12 U.S.C. § 611, *et seq.*

So long as the Branches be regarded as a single legal entity with the home office, or with the American Edge Act Corporation, which this Court thinks they must be, reimbursement by the Branch to Boston would merely be an internal bookkeeping procedure, and the lack or failure of reimbursement would carry no legal consequences. There could be no "debt" between these Branches and the home office under those circumstances. As noted, the Branch was not separately incorporated under Cuban law. It had no shareholders, stock certificates, President or Board of

Directors of its own. The capital of the Branch was supplied by the Boston bank. Boston paid United States taxes on all profits derived from the Cuban Branches operation when such profits were remitted to Boston. In short, the Cuban Branch was no more than just that, a branch of the main office.

Plaintiff urges that in connection with arms-length commercial dealings a banking branch and its home office may be considered separate entities which are capable of entering into a debtor-creditor relationship. Plaintiff would have recourse to Cuban law, to be selected under New York State conflict of law rules, (*Auten* v. *Auten*, 308 N.Y. 155, 160 (1954). That rule, which applies "the law of the place which has the most significant contacts with the matter in dispute" would choose Cuban law as the law having the greatest contacts with the transaction for purposes of determining whether a bank's branch is a separate legal entity. Expert opinion based on reported pre-revolutionary decisions in Cuba suggests, at least in the context of tax questions, that a branch of a foreign bank located in Cuba could maintain that it was "an organism different from its home office." The Cuban decisions relied on are *Royal Bank of Canada* v. *Secretary of Treasury*, Decision No. 273, October 17, 1929, Supreme Court of Cuba; *Bank of Nova Scotia* v. *Administracion General de Cuba*, Decision No. 85, June 21, 1930; and *Jacob Dold Packing Co.* v. *Secretary of Treasury*, Decision No. 92, April 20, 1932, Supreme Court of Cuba.

While this Court is not prepared to say that the Cuban legal learning relied upon is limited to tax cases, its application here would appear inappropriate. To do so would permit a national bank to evade the limitations provided under federal law against investing in wholly-owned subsidiaries. See particularly, 12 U.S.C. §§ 601, 603. There

is a federal public policy at stake which would be evaded if, merely to prevail in this lawsuit an American bank could assert in this Court that its branches were subsidiaries under Cuban law, and not to be treated as branches in an American court. Branches they were, and they were never held out to be other than Branches.

III

We next consider whether Banco Nacional in its capacity as a foreign state has sovereign immunity in this action. The right to exercise sovereign immunity as a complete affirmative defense was codified by Congress in the Foreign Sovereign Immunities Act of 1976. While this statute became effective January 21, 1977, there is authority that it is retrospective as to litigation pending at the time of its adoption. See, *Yessenin-Volpin* v. *Novosti Press Agency*, 433 F.Supp. 849 (S.D.N.Y. 1978).

The Court concludes that the Republic of Cuba and/or Banco Nacional are not immune in this litigation. Although each is a foreign state under the Act, the letter of credit transactions fall within the statutory exception to sovereign immunity found in 28 U.S.C. § 1604(a)(2). The commercial activity surrounding these letters of credit was carried on in major part in the United States. The circumstances giving rise to the claim arose while the Branches of Boston or BBI in Cuba were conducting what was then a purely commercial activity. Cuba or Banco Nacional is sued here solely because it is the successor in interest of the Branches, which took over the going business being conducted in Cuba by them, and receiving the avails, became liable in *quasi* contract for the countervailing burdens of the transactions. While this Court believes that the status of Banco Nacional, at least on and after the enactment of Law No. 891 of

October 13, 1960, is that of an arm of the Government equivalent to the Treasury itself, that statute was passed after the credits sued on here came into existence. See *Carey* v. *National Oil Corp.*, 453 F.Supp. 1097, 1102 (S.D.N.Y. 1978).

IV

We then consider whether repudiation of the claim by Banco Nacional is an Act of State. The only evidence of the repudiation of the claim is its non-payment. There is nothing cited to this Court in any Cuban statute or decree which would prevent Banco Nacional, having assumed the customer side of the letter of credit transactions, from honoring its obligations to the confirming bank which paid the beneficiaries. Indeed, the whole thrust of the Cuban statutory scheme for undertaking the continued operation of these banks is, on its face, otherwise. Furthermore, a plurality of the Supreme Court has held that a mere refusal by officials of a foreign government to honor a legal obligation does not rise to the level of an "Act of State." See *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976). Therefore, this Court need not give full legal effect to Banco Nacional's refusal to reimburse Boston on the letters of credit, and may enforce the debt owed to Boston in this case.

V

We now consider whether plaintiff, in its own right or as assignee of Boston, may decide unilaterally whether the defendant's various funds, totalling $941,470 (hereinafter "the Payments") (*supra*, pp. 7-8), which have been collected by Boston from other transactions are to be set off against the value of Boston's expropriated Branches in Cuba

or whether that sum should be set off against plaintiff's recovery in this action. We think plaintiff may do so, and that it has made an effective election to apply the Payments to the expropriation claim rather than to the letters of credit claim sued on here.

The Payments were not involuntary court ordered payments, but resulted in the most part from Boston exercising self-help, and setting off funds which defendant had either paid voluntarily or had allowed to come into possession of Boston. At no time prior to this litigation did Banco Nacional designate the application of the Payments. Indeed, it denies any indebtedness.

The ordinary rule is that a creditor, such as plaintiff is with respect to its confiscated Branches and the claims sued on here, may, in the absence of a contemporaneous designation by a voluntary payor, designate to which of several items of indebtedness and in what amounts payment must be applied. *Harding* v. *Tifft*, 75 N.Y. 461, 464 (1878); *Marine Midland Bank—New York* v. *Graybar, Inc.*, 41 N.Y.2d 703, 708 (1977) (citing pre-UCC rules concerning set offs by banks); *Long Island Trust Co.* v. *Vendall, Inc.*, 35 Misc.2d 464 (Sup. Nassau Co. 1962). While a debtor "must exercise his option as to the application [of his payment to one or more debts owing the same creditor] when he makes payment," *Bank of California* v. *Webb*, 94 N.Y. 467, 471 (1884), an election or designation by the creditor as to which of several indebtednesses will be satisfied was permitted more than a year following payment. *Id.* See also, *Nat'l. Bank of Newburgh* v. *Bigler*, 83 N.Y. 51, 64 (1880). Indeed, a creditor has been permitted to allocate a payment received from his debtor without specific directions, to satisfy interest which the debtor contended he did not owe, rather than to a principal indebtedness which

debtor did not dispute and apparently intended to pay. *Feldman* v. *Beier*, 78 N.Y. 293, 300 (1879). We end our discussion of voluntary payment with reference to *Belden* v. *State*, 103 N.Y. 1, 9 (1886) wherein the Court held in a case involving set off:

> "The existence of the means of payment in the hands of the creditor, and the lapse of time, are conclusive evidence of the pre-existing fact of an actual discharge of the accruing debt, or are of themselves facts which require a court of equity to adjudge such application to have been made."

In this case, possession of the Payments by Boston and the lapse of time lead to the same conclusion.

While we do not regard the Payments as involuntary, were they so, application must be made according to equitable principles. *Orleans County Nat'l. Bank* v. *Moore*, 112 N.Y. 543, 548 (1889). Equity would require that the Payments be applied just as Boston has done, because otherwise, Boston's claim to recover for the value of the confiscated Branches would be unenforceable, while the claim sued on here is litigable. See *Chase-Citibank* decision, and *Banco I*, holding that there is no judicial remedy for the taking of the Branch Banks except by way of set off.

VI

The discussion in Point V hereof applies equally to defendant's counterclaim pleaded here for $58,460.55 against plaintiff's assignor, Boston, and cognizable at most as a set off. There also, plaintiff may be deemed to have applied that sum to its claims other than sued on herein, and all relief on the counterclaim will be denied.

CONCLUSION

Either party may, within fifteen (15) days, present formal requests for additional findings of fact as to any point not disposed of directly or inferentially by this memorandum decision. A final judgment shall be settled on waiver of notice of settlement or on fifteen (15) days notice. The judgment may provide that enforcement be stayed, without bond and without the necessity of any further or additional application, pending appellate finality.

Dated: New York, New York
January 4, 1980

/s/ CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

APPENDIX C

Opinion of the District Court on Reargument

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 4663-CLB

BANCO NACIONAL DE CUBA,

Plaintiff,

—against—

CHASE MANHATTAN BANK,

Defendant.

61 Civ. 2116-CLB

THE FIRST BANK OF BOSTON (International),

Plaintiff,

—against—

BANCO NACIONAL DE CUBA,

Defendant.

Brieant, J.

Plaintiff Banco Nacional de Cuba seeks on reargument to obtain an award of pre-judgment interest in the first above entitled action, 60 Civ. 4663. A letter from its counsel dated February 4, 1980 has been treated as a motion for reargument of this Court's decision dated January 4, 1980, to the extent it denies such interest. Such reargument was heard on February 14, 1980.

A decision also dated January 4, 1980 in the second above entitled action, 61 Civ. 2116, was silent on the

subject of pre-judgment interest. Arguably this silence, which results in awarding such interest in a diversity case regulated by New York law, was inconsistent with the simultaneous decision in *Chase*. In fact, the omission in the Boston decision was inadvertent. Reargument of the same point was also held in the second above entitled *"Boston"* case.

In the *Chase* decision of January 4, 1980, this Court denied pre-judgment interest to plaintiff Banco Nacional, after a careful review of New York law found beginning on p. 73. The theory of plaintiff's claim is based on breach of contract or money had and received; that of the defendant is based on breach of contract and conversion. Section 5001 of the New York Civil Practice Law and Rules, when read literally, provides for the recovery of pre-judgment interest in such actions as a matter of right. However, as this Court's decision pointed out, historically, the right to pre-judgment interest in the New York courts is not so absolute as the statute would suggest. Such interest has been awarded only from the time the principal debt becomes due and *payable*. Thus, if *force majeure* or a rule of law prohibits the payment of the principal debt, New York will not uphold a demand for interest on the principal debt during the existence of such a prohibition. See, *Wheelock* v. *Tanner*, 39 N.Y. 481 (1868); *Moscow Fire Insurance Co.* v. *Heckscher & Gottlieb*, 260 App.Div. 646, 23 N.Y.S.2d 424 (1st Dept. 1940), *aff'd*, 285 N.Y. 674, 34 N.E.2d 377 (1941) and the discussion in the prior decision cited above.

Relying on this authority, this Court concluded that since remittances to Cuba have been, during the relevant time period, prevented by federal law, 31 C.F.R. § 515, and because payment by Chase of the net balance of the prin-

cipal debt therefore was impossible, no pre-judgment interest should be awarded to plaintiff.

Plaintiff Banco Nacional urges on reargument that this decision was incorrect because the Court of Appeals of the Second Circuit has decided the issue of state law presented here several times recently, and that this Court is bound to follow those decisions. Specifically, Banco Nacional cites *Menendez* v. *Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. denied* on the issue of pre-judgment interest, *sub nom. Republic of Cuba* v. *Saks & Co.*, 425 U.S. 991 (1976); *Spector* v. *Mermelstein*, 485 F.2d 474 (2d Cir. 1973); *United Bank, Ltd.* v. *Cosmic Int'l., Inc.*, 542 F.2d 866 (2d Cir. 1975); and *Lee* v. *Joseph E. Seagram & Son*, 592 F.2d 39 (2d Cir. 1979), for the principle that an award of pre-judgment interest in a contract action is in all events required.

In reply, Chase contends that § 5001 of the New York CPLR does allow the trial court to exercise discretion in awarding pre-judgment interest if the action is of an equitable nature. Chase contends that because its set-off claim was equitable in nature, stemming from the lack of any direct legal remedy against Banco Nacional, and because the set-off was the dominant claim in the action, the action before this Court was really one in equity. *Frey Realty Co.* v. *Ten W. 46th St. Corp.*, 1 Misc.2d 371 (Sup. Ct. N.Y. Co. 1955).

In *Menendez* v. *Saks & Co.*, *supra*, the Court of Appeals of the Second Circuit held that because importers from the United States were liable to Cuban Interventors for certain shipments of cigars, pre-judgment interest on any recovery by the Interventors was required by New York CPLR § 5001. That the United States importers asserted successful set-off claims against the Interventors did not

alter this result. It is true, as Chase argues, that the Court of Appeals did not consider explicitly whether the set-off claims of the importers were sufficient to make the action one of an equitable nature, in which the trial court could have exercised discretion. Nor did the Court of Appeals opinion mention that the importers could not have paid the Cuban Interventors because of the various regulations prohibiting the transfer of funds from the United States to Cuba, as this argument was apparently not made.

Instead, the Court of Appeals decided on a broad but literal interpretation of the New York statute, and this is apparent from the later cases cited by the plaintiff, *supra.*

Of course, the question is purely one of New York State law, which under familiar *Erie* principles, all federal courts, including the Court of Appeals must follow and not make. We believe our application of the New York cases is correct. Banco Nacional meets these New York authorities obliquely, arguing that even so, the point is precluded by *Menendez,* a case close in time and subject matter to the instant case, and if *Menendez* is an incorrect application of New York law, such is not for us to say, but we must leave it for elucidation by higher authority. As to this, Banco Nacional is probably right. Of course we do not know what arguments were made to that Court in *Menendez,* where the pre-judgment interest point was hardly crucial to the cause.

Accordingly, the decision of January 4, 1980 is modified on reargument to award Banco Nacional pre-judgment interest at New York State rates for judgments, on its net recovery against Chase Manhattan Bank in 60 Civ. 4663. For the same reasons, The First Bank of Boston (International) will be entitled to pre-judgment interest in 61 Civ. 2116. No formal modification of the decision in that case is necessary.

So Ordered.

Dated: New York, New York
February 21, 1980

/s/ CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

APPENDIX D

Opinion of the Court of Appeals
Banco Nacional de Cuba v. Chase Manhattan Bank

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 111, 192—September Term, 1980

(Argued January 26, 1981 Decided August 4, 1981)

Docket Nos. 80-7375, -7377

BANCO NACIONAL DE CUBA,

Plaintiff-Appellant-Cross-Appellee,

—v.—

CHASE MANHATTAN BANK,

Defendant-Appellee-Cross-Appellant.

Before:

LUMBARD, VAN GRAAFEILAND, and KEARSE,
Circuit Judges.

Appeal and cross-appeal from a final judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* 505 F. Supp. 412, in favor of plaintiff Cuban state-owned bank, allowing set-off by counterclaim to extent of $6,904,870 for loss due to expropriation of defendant's branch banks, and dismissing counterclaims relating to other expropriations. Affirmed as modified.

Appendix D—Opinion of the Court of Appeals
Banco Nacional v. Chase Manhattan Bank

VICTOR RABINOWITZ, New York, New York (Michael Krinsky, Judith Levin, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York, New York, on the brief), *for Plaintiff-Appellant-Cross-Appellee.*

ANDREW J. CONNICK, New York, New York (Milbank, Tweed, Hadley & McCloy, New York, New York, on the brief), *for Defendant-Appellee-Cross-Appellant.*

KEARSE, *Circuit Judge:*

This is an appeal from a final judgment in one of a number of cases arising out of the revolution in the Republic of Cuba in the late 1950's and the subsequent expropriation by the Cuban government of properties owned by American companies.[1] In the present action, Banco Nacional de Cuba ("Banco Nacional"), a Cuban state-owned bank, sought to recover $9,794,022 from Chase Manhattan Bank ("Chase") on claims whose validity is not in dispute. Chase asserted several counterclaims seeking damages for the expropriation by Cuba of branch banking assets owned by Chase in its own right (hereinafter sometimes "branch counterclaim"), and of railroad

[1] This is one of six appeals decided today relating to property of American banks. The other five cases are *Banco Para el Comercio Exterior de Cuba* v. *First National City Bank*, No. 80-7297; *First Bank of Boston (International)* v. *Banco Nacional de Cuba*, No. 80-7299; *Banco Nacional de Cuba* v. *Chemical Bank & Trust Co.*, No. 80-7215; *Banco Nacional de Cuba* v. *Irving Trust Co.*, No. 80-7205; and *Banco Nacional de Cuba* v. *Manufacturers Trust Co.*, No. 80-7209. The last three cases were consolidated for argument and were decided in a single opinion.

equipment owned by Chase as a trustee for certain American investors (hereinafter sometimes "railroad equipment counterclaims"). The United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge*, entered judgment in favor of Banco Nacional on its claim, less $6,904,870 allowed as a set-off on account of Chase's counterclaim for expropriation of its Cuban branches, and dismissed the remaining counterclaims. Banco Nacional has appealed, asserting that Chase's branch counterclaim was not justiciable and that the valuation of Chase's Cuban branches was, in any event, too high. Chase has cross-appealed, challenging the dismissing of its railroal equipment counterclaims and arguing that the district court did not adequately value its branches as a going concern.

While we are in agreement with most of the district court's rulings, we conclude that a realistic appraisal of conditions in Cuba required a lower valuation of Chase's Cuban branches. The judgment should be modified accordingly and as modified, it is affirmed.

I. FACTS

The events surrounding the Cuban revolution have spawned extensive litigation, giving this Court and others several opportunities to review the facts of the overthrow of the Batista regime and the organization and installation of the current government. *See, e.g., Banco Nacional de Cuba* v. *First National City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019 (1971), *on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759 (1972),

on remand, 478 F.2d 191 (2d Cir. 1973); *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd* 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964), *on remand sub nom. Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1965), 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). Familiarity with these discussions is assumed.

A. *The Expropriations*

The Cuban revolution resulted in the installation of a new national government on January 1, 1959, under the leadership of Fidel Castro Ruz, Che Guevara, and others.[2] The new regime viewed itself as the lawful successor to its predecessor, the Batista government, and effected substantial changes in Cuba primarily by building on preexisting laws and institutions. A number of statutes were enacted, and decrees announced, in pursuit of two general goals: to concentrate the means of production in the hands of the Cuban government and to restrict greatly the role of foreign enterprises in the Cuban economy.

On July 6, 1960, following a serious deterioration of relations between Cuba and the United States, Cuba enacted Law No. 851 which, inter alia, authorized the President and Prime Minister of the Republic "to order[ ] the nationalization through forced expropriation of the assets or firms owned by natural or legal persons of United States citizenship . . . ." Under this law Cuba nationalized numerous American-owned corporations, branches, and businesses. On September 17, 1960, an executive order pursuant to Law 851, denominated "Res-

[2] *See, e.g.*, H. L. Matthews, *Revolution in Cuba* 112-22 (1975).

olution No. 2," expropriated and nationalized the four Cuban branches of Chase. The Cuban assets of First National City Bank ("Citibank") and First National Bank of Boston ("First Boston") (*see* note 1, *supra*) were expropriated by the same Resolution;[3] and thereafter, on October 13, 1960, pursuant to a new law, Law No. 891, virtually all remaining private banking firms were nationalized.[4]

On October 13, 1960, the Cuban government also promulgated Law No. 890, which nationalized "through forced expropriation" all business, industrial enterprises, and other property of railroads operating in Cuba.

Each of the above laws provided that, under certain circumstances, payment would be made by the Cuban government for the expropriated assets. The parties have stipulated that no payment was made.

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[3] The Resolution read in part as follows:

We Resolve:

First: To order the nationalization, by expropriation, and, consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1—The First National City Bank of New York
2—The First National Bank of Boston
3—The Chase Manhattan Bank

Second: Consequently, the Cuban Government is substituted for the legal persons named in the foregoing paragraph as to the aforesaid assets, rights and shares, as well as the assets and liabilities of the aforementioned companies.

[4] Law No. 891 did not call for the nationalization of Canadian-owned banks, which were acquired by the Republic at a later date.

Appendix D—Opinion of the Court of Appeals
Banco Nacional v. Chase Manhattan Bank

B. *Banco Nacional and Its Claims*

Since its formation in 1948, Banco Nacional has functioned as the central Bank of Cuba. Prior to the revolution, one-half of its stock was owned by the Cuban government, which appointed its president and three of its five directors. The remaining one-half of its stock was owned by private banks, which were required to subscribe thereto. Banco Nacional engaged in domestic and international banking, was the sole depository of state funds, and was granted extensive powers both to control and protect the Cuban currency in international trade and to regulate all commercial banks operating in Cuba.

After the revolution Banco Nacional was granted additional powers and played a key part in restructuring the Cuban economy in general and the banking industry in particular. Under Resolution No. 2, Banco Nacional was designated the instrumentality to take over the assets and businesses of Chase, Citibank and First Boston. Under Law No. 891, Banco Nacional was similarly placed in control of the assets and businesses of the remaining private banks, and thereafter became wholly owned and operated by the Cuban government. Banco Nacional did not have a similar role with respect to nationalization of the railroads under Law No. 890. That law was to be administered by the Corporación Nacional de Transportes.

Banco Nacional commenced the present action in 1960, asserting several claims totaling $9,794,022, the validity of which is not contested by Chase. First, Banco Nacional sought to recover some $7 million as successor in interest to two other Cuban state-owned banking enterprises, Banco de Desarollo Económico y Social ("Bandes") and Fonda de Estabilización de la Moneda ("Fonda"). In 1958 Chase

had loaned Bandes $30,000,000, secured by United States Government obligations owned by Fonda and having a face value in excess of $30,000,000. Banco Nacional succeeded these two enterprises in February 1960 and made payments on the loans. On September 17, 1960, the date on which Cuba expropriated Chase's branches, the unpaid balance of the loan was $10,000,000. Within days of the expropriation, Chase sold the collateral then in its possession for more than $17,000,000, applied the proceeds against the outstanding loan balance (including accrued interest), and held a surplus of $7,256,398. Chase notified Bandes and Banco Nacional of the sale and informed them that the surplus would not be returned but rather would be retained to offset Chase's losses resulting from the expropriation.

In addition, Banco Nacional sought to recover in its own right for various sums it had on deposit with Chase on September 17, 1980, aggregating $2,537,622. Chase refused to repay those sums, and instead applied them against obligations allegedly owed it by the Republic of Cuba, its agencies and instrumentalities.

C. *Chase's Counterclaims*

Chase asserted four counterclaims. The branch counterclaim alleged that Chase had been engaged in branch banking in Cuba continuously since 1925 and at the time of the expropriation maintained four branches. Chase alleged that the properties, which it valued at $8,619,457, had been converted in violation of international law, and sought full recovery from Banco Nacional as the alter ego of the Cuban government. Chase also asserted an alternative counterclaim for the loss of its Cuban branches based

on an implied contract theory. This counterclaim asserted that under Law No. 851 Banco Nacional succeeded to all of the liabilities of the seized branches, and that Chase's Cuban branches were indebted to Chase for approximately $6,000,000.

Chase stated two counterclaims in its capacity as trustee for American investors owning railroad equipment leased to the Cuban Railroad Company and Cuban Northern Railways Company under financing leases. This equipment, valued by Chase at $4,047,910, was nationalized on October 13, 1960, and Chase, as Trustee, sought recovery on behalf of the equipment trust certificate owners.

Chase did not seek affirmative relief on its counterclaims, the total value of which exceeded the amount sought by Banco Nacional, but merely requested that Banco Nacional's complaint be dismissed.[5]

D. *Decision of the District Court*

The case was tried before the late Judge Frederick van Pelt Bryan who died without having rendered a decision. The action was then assigned to Judge Brieant who, with the agreement of the parties, decided the case on the basis of the record made before Judge Bryan.

In a reasoned opinion, reported at 505 F. Supp. 412, Judge Brieant ruled that, for purposes of Chase's branch counterclaim, Banco Nacional is the alter ego of the Cuban

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[5] Under *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), the immunity of a foreign sovereign from suit does not bar interposition of counterclaims, once the sovereign itself has brought suit, but the amount recoverable on the counterclaims may not exceed the value of the sovereign's claims. *Id.* at 358, n.2; *see United States* v. *Shaw*, 309 U.S. 495 (1940).

government,[6] that the branch counterclaim is justiciable, and that Chase is entitled to a set-off on this counterclaim in the amount of $6,904,870. The court dismissed Chase's implied contract counterclaim on its merits. Chase's counterclaims as railroad equipment trustee were dismissed on the ground that these counterclaims could not properly be interposed under Fed. R. Civ. P. 13(b).[7] Banco Nacional's claims not having been disputed, judgment was entered for Banco Nacional in the net amount of $2,889,150, with the instruction that Chase pay that amount into a special account controlled by federal authorities under the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (1980).[8]

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[6] In *Banco Nacional de Cuba* v. *First National City Bank, supra,* 478 F.2d at 193, we held that

> for the purposes of this litigation Banco Nacional is the alter ego of the Republic of Cuba . . . .
>
> The undisputed evidence in the record amply supports the conclusion that Banco Nacional and the government of Cuba acted as one in the nationalism of National City Bank's property.

Given the identical laws and circumstances leading to the expropriation of the Citibank and Chase branches, *see* note 3 *supra,* and accompanying text, the district court held that ruling equally applicable to the present case. This conclusion appears to be eminently correct, *see Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971); *Shore* v. *Parklane Hosiery Co., Inc.,* 565 F.2d 815, 818-19 (2d Cir. 1977), *aff'd,* 439 U.S. 322 (1979), and it has not been challenged on this appeal.

[7] These conterclaims had been dismissed in 1974 by Judge Bryan in an oral decision. While Judge Brieant discussed the basis for the ruling at some length, *see* 505 F. Supp. at 435-42, a substantial part of the discussion quoted a draft by Judge Bryan, and Judge Brieant did not consider that he himself had made an "independent decision" to dismiss, *id.* at 435.

[8] Congress has established a procedure by which the Foreign Claims Settlement Commission of the United States is to determine the amount

(footnote continued on following page)

E. *Issues on Appeal*

On this appeal Banco Nacional argues that the district court erred in allowing Chase to assert its counterclaim for the expropriation of its Cuban branches, contending that, under *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964) (*"Sabbatino"*), the act of state doctrine bars the court from adjudicating the counterclaim, and that the amount of compensation, if any, due under international law for an expropriation of property is a nonjusticiable, political question. In addition Banco Nacional contends that the court overvalued Chase's Cuban assets in several respects.

Chase makes two principal arguments in support of its cross appeal. First, as to its branch counterclaim, it contends that the district court placed too low a going-concern valuation on the branches, and that the amount of the setoff it was allowed should therefore have been higher.[9] Second, Chase contends that its should have been allowed to pursue its two counterclaims asserted in its capacity as trustee of the railroad equipment that was nationalized on October 13, 1960.

We have examined all of the arguments of the parties and find merits only in Banco Nacional's contention that

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and validity of claims of American nationals against the Cuban government. 22 U.S.C. §§ 1643-43k (1979). Amounts recovered by Cuba or its nationals in actions in the United States are in effect frozen, *see* 31 C.F.R. Part 515, and may later be included in a fund to be administered by the Commission pursuant to further congressional instruction.

[9] Chase's implied contract counterclaim for loss of its branches was asserted as an alternative in case its conversion theory was rejected, and Chase's appeal from the dismissal of the implied contract counterclaim is similarly stated as a "fall back" position. Since we uphold the branch counterclaim on the conversion theory, we need not address the implied contract theory.

Chase was not entitled to recover for the "going concern" value of its branches.

II. JUSTICIABILITY OF THE BRANCH COUNTERCLAIM

We turn first to the question of whether Chase's counterclaim with respect to the expropriation of its Cuban branches is justiciable. Notwithstanding the rule laid down in *Sabbatino,* we conclude that the district court's decision that the branch counterclaim is justiciable was compelled by the Supreme Court's decision in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972) (*"Citibank I"*).

A. *The Act of State Doctrine*

The history and development of the centuries-old act of state doctrine were thoroughly explored by the Supreme *Court in Banco Nacional de Cuba* v. *Sabbatino, supra.* Prior to *Sabbatino,* although there was considerable disagreement as to the precise contours of the doctrine, *see generally* Note, *Rehabilitation and Exoneration of the Act of State Doctrine,* 12 N.Y.U.J. Int'l Law & Pol. 599, 601-10 (1980), the doctrine was generally viewed as having its origins in principles of sovereign immunity, *id.* at 600-01; *Sabbatino, supra,* 376 U.S. at 445-50 (White, J., dissenting), and in the United States it was generally described as barring the courts of this country from adjudicating the validity of acts of the government of another country committed within its own territory. *See, e.g., Underhill* v. *Hernandez,* 168 U.S. 250 (1897).

In *Sabbatino,* which arose out of the Cuban government's expropriation of the Cuban assets of an American

commodities broker who had contracted to purchase Cuban sugar, the Supreme Court reexamined the foundations of the doctrine and arrived at a new formulation. Briefly, the Court rejected the traditional sovereign immunity analysis of the doctrine, 376 U.S. at 421, and found it rooted, principally, in the Constitution's separation of the powers of the three branches of government, *id.* at 423. The Court described the doctrine as a principle of decision that is not technically required by the Constitution, but that must nevertheless reflect "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.* at 427-28. Further, it observed that the propriety of a court's adjudication of a particular type of international law question increased as the degree of codification or consensus as to the substantive principles concerning the area increased. *Id.* at 428. Recognizing the need for flexibility in accommodating the role and needs of the Executive Branch in dealing with matters affecting the country's international relations, the Court announced that

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id.

The Court proceeded to review the sharp divergence of views as to the limitations on a state's power to expropri-

ate property of aliens within its borders, *id.* at 428-30, and to remark on social and ideological schisms underlying some of the disagreements as to the standards relating to expropriations. *Id.* at 430. Concluding that it could easily risk interference with the Executive Branch's negotiations by passing on questions arising in so uncertain an area, the Court held that the act of state doctrine foreclosed inquiry into the Cuban expropriation of the Cuban assets of the sugar broker, even if the expropriation violated international law.

B. *The Decision in* Citibank I

While the result and reasoning of *Sabbatino* would appear to require that Chase's present counterclaims be held nonjusticiable under the act of state doctrine, later action by the Supreme Court dictates the contrary result. *Citibank I*, 406 U.S. 759, involved precisely the same factors as exist here with respect to Chase's branch counterclaim: Citibank sought a set-off for the expropriation on September 16, 1960, pursuant to Resolution No. 2 of Law No. 851, of its Cuban branches, up to the amount of claims asserted by Banco Nacional to recover for deposits that Citibank refused to repay and to recover a surplus realized by Citibank on the sale of collateral held as security for a loan to Bandes. After an initial decision by the district court holding Citibank's counterclaim justiciable,[10] this Court ruled that the act of state doctrine

[10] Following the Supreme Court's decision in *Sabbatino*, Congress sought to blunt the effect of that decision by passing the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-659 (Sept. 6, 1965), which states as follows:

(footnote continued on following page)

as set forth in *Sabbatino* barred adjudication of Citibank's counterclaim, 431 F.2d 394. At the direction of the Supreme Court, 400 U.S. 1019, we reviewed our decision

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(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

The constiutionality of this amendment was upheld in *Banco Nacional de Cuba* v. *Farr, supra.*

The district court in the *Citibank I* litigation relied on the Hickenlooper Amendment in holding Citibank's counterclaim justiciable. 270 F. Supp. at 1007-10. On appeal, we thoroughly reviewed the history of the Amendment, and concluded that the Amendment was intended to afford American firms a "day in court" if some entity attempted to market their expropriated Cuban property in the United States, and was not intended to permit a setoff in all cases. 431 F.2d at 399-402. Although our decision reversing on this basis was vacated and remanded by the Supreme Court for reconsideration in light of the State Department's proffered *Bernstein* letter, *see* text following this note, the Supreme Court expressed no opinion on the merits of our view of the applicability of the Amendment either at that time, 400 U.S. 1019 (1971), or after our adherence to our view on reconsideration, *see* 442 F.2d 530 (1971), *reversed on other grounds,* 406 U.S. 759.

in light of a letter from the Legal Advisor of the Department of State advising that the foreign policy interests of the United States would not be injured by adjudication of the merits of the counterclaim, 442 F.2d 530, and we adhered to that decision notwithstanding our ruling some years before in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) ("*Bernstein*"). In *Bernstein* we had initially refused to allow adjudication of the validity of acts of the Nazi government of Germany in the absence of any expression of views from the Executive Branch, *see* 173 F.2d 71, but had reversed that decision and, as an exception to the act of state doctrine, allowed adjudication after receiving advice from the Acting Legal Advisor to the State Department that was expressly intended " 'to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.' " 210 F.2d at 376.

The Supreme Court, in *Citibank I*, voted 5-4 to reverse our ruling that the Citibank counterclaim was nonjusticiable. The Court did not, however, agree on a rationale. Three members of the Court expressly relied on the *Bernstein* exception, to the effect that the act of state doctrine does not apply when the Executive Branch supports adjudication. 406 U.S. at 760-70 (Rehnquist, J., joined by the Chief Justice and Justice White). These three Justices found *Sabbatino* not dispositive because in that case the State Department, while opining that the Cuban expropriations violated international law, had stated its "wish not to make any statement bearing on [that] litigation," *Sabbatino*, 376 U.S. at 420; the *Sabbatino* court had expressly declined to rule on the *"Bern-*

stein" exception. *Id.* at 420, 436. In *Citibank I*, in contrast, the Legal Advisor to the State Department urged the Court, in a letter dated November 17, 1970, to adjudicate issues as to which the Executive Branch publicly advised the Court that the act of state doctrine need not be applied, and stated that the doctrine need not be applied to claims such as those asserted by Citibank:

> "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

Citibank I, 406 U.S. at 764. The three Justices concluded that

> where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.

406 U.S. at 768.

One member of the majority, Justice Douglas, found the Citibank situation governed not by *Sabbatino* or *Bernstein*, but by *National City Bank v. Republic of China*, 348 U.S. 356 (1955), in which the Court had held that when a foreign sovereign brings suit in an American court under American laws, in fairness it may not assert sovereign immunity as a defense to a counterclaim that is limited to the amount of the sovereign's claim. *Citibank I*, 406 U.S. at 770-71. Justice Douglas thus concurred in the *Citibank I* result on grounds of " 'fair dealing,' " but emphasized that to the extent that the defendant's coun-

terclaim exceeded the value of the main claim, it would be nonjusticiable under *Sabbatino*. *Id.* at 772-73.

The fifth member of the majority, Justice Powell, found neither *Bernstein* nor *Republic of China* controlling. Justice Powell viewed *Sabbatino* as implicitly disapproving the *Bernstein* exception, the *Sabbatino* majority's disclaimers notwithstanding, and in addition viewed as inappropriate a rule that would require the judiciary to receive the Executive Branch's permission in order to proceed. *Citibank I*, 406 U.S. at 773. He viewed *Republic of China* as not dispositive because that case dealt with the foreign sovereign's amenability to the court's jurisdiction, rather than with the justiciability of a claim between parties concededly subject to that jurisdiction. 406 U.S. at 773-74. Nevertheless, Justice Powell concluded that *Sabbatino* did not bar adjudication of Citibank's counterclaim. Noting that had he been a member of the *Sabbatino* Court he would likely have joined the dissenting opinion of Justice White, Justice Powell found *Sabbatino*'s breadth unacceptable. In his view, the courts should adjudicate claims relating to foreign expropriations "[u]nless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches." *Id.* at 775. Finding that no such conflict had been shown, Justice Powell voted to reverse the dismissal of Citibank's counterclaim.

The four dissenting Justices, in an opinion by Justice Brennan, took sharp issue with each of the views espoused by the Justices comprising the majority, viewing the reasoning and result of *Sabbatino* as mandating the dismissal of Citibank's counterclaim.

Thus, none of the various rationales proffered by the members of the majority attracted more than three votes.

The *Bernstein* exception, adopted by three Justices, was explicitly rejected by six; the view that *Republic of China* controlled was expressed only by Justice Douglas, although the opinion of Justice Rehnquist for himself and two other members of the Court saw that situation as "closely analogous," *id.* at 769; and Justice Powell's view that *Sabbatino* should be so narrowly interpreted as to be inapplicable to Citibank's counterclaims, was his view alone.

But while the divergent views of the majority appear to provide no common ground from which we may articulate a *Citibank I* rationale,[11] we are bound to reach the same result as *Citibank I* where there is no significant difference in circumstance.

C. *Application of Citibank I*

Cumulating the views of the Justices comprising the *Citibank I* majority, we arrive at the following phenomenological rule: where (1) the Executive Branch has provided a *Bernstein* letter advising the courts that it believes

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[11] The guidance provided by the Supreme Court for interpreting its plurality opinions is that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)." *Marks* v. *United States*, 430 U.S. 188, 193 (1977). *See* Davis & Reynolds, *Juridicial Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59; Hardisty, *Reflections on Stare Decisis*, 55 Ind. L.J. 41, 52-57 (1979); Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127 (1981). The three views of the Justices comprising the majority in *Citibank I* are not so reconcilable.

act of state doctrine need not be applied, (2) there is no showing that an adjudication of the claim will interfere with delicate foreign relations, and (3) the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the sovereign's claim, adjudication of the counterclaim for expropriation of the defendant's property is not barred by the act of state doctrine.[12] We find all three conditions satisfied by Chase's branch counterclaims.

In the present case there are three State Department communications pertinent to the Executive Branch's views. The first is the November 17, 1970, letter described above in connection with the *Citibank I* litigation, in which the Department took the position that the act of state doctrine should not be applied in that "or like" cases. The present case involving Chase is certainly "like" *Citibank I*, the expropriations of both Chase and Citibank branches having occurred in September 1960, pursuant to Law No. 851 and Resolution No. 2. On July 24, 1973, the State Department wrote to Chase's counsel stating that the Department continued to hold the view expressed in the November 17, 1970, letter with respect "to 'this or like cases.'" Finally, on June 11, 1980, the Department confirmed that it still held those views, and stated that the present Chase litigation and the current

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[12] Our recent decision in *Empresa Cubana Exportadora de Azucar y Sus Derivados* v. *Lamborn & Co.*, No. 80-7884 (2d Cir. June 11, 1981, as amended by order filed June 17, 1981), does not contradict this formulation. In *Lamborn*, we held that the act of state doctrine was applicable to bar recovery, by way of either complaint or counterclaim, for assets seized by the Cuban government. The party seeking to recover from the Cuban government in *Lamborn* had no *Bernstein* letter, and the Executive Branch had expressed no view as to the applicability of the act of state doctrine in that case.

Citibank litigation [13] "definitely appear to be 'like cases' to" *Citibank I.*

Hence, Chase has the benefit of *Bernstein* letters from the State Department; there has been no showing of any respect in which the adjudication of its claim will interfere with United States foreign relations; and its claim is asserted by way of setoff. The decision of the Supreme Court in *Citibank I* compels the conclusion that Chase's branch counterclaim is justiciable.

Finally, we find no merit in Banco Nacional's argument that even if the counterclaim is justiciable, the damage issue is nonjusticiable because there is insufficient international consensus as to standards of required compensation. Although we agree that it is difficult to state precisely what international law requires regarding damages for expropriation, *see* Part IV.A., *infra,* and we note that this was a consideration of the majority in *Sabbatino* in deciding to apply the act of state doctrine, *see* 376 U.S. at 429-30, we conclude that in cases such as the present one any argument as to the justiciability of damages has been foreclosed by the *Citibank I* decision as to the justiciability of the counterclaim in which those damages are sought. Thus, the opinion of Justice Rehnquist in *Citibank I* indicated that where, as here, the act of state doctrine is inapplicable, a court of the United States "will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law." 406 U.S. at 763 (citation omitted). For Justice Douglas, the very conclusion that justiciability turned on the amount of the counterclaim necessarily contemplated that valuation issues were to be

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[13] *See* note 1 *supra.*

decided. *Id.* at 772. And Justice Powell, who found no political reason to apply the act of state doctrine, stated ". . . I conclude that federal courts have an obligation to hear cases such as this. . . . I think the courts have a duty to determine and apply the applicable law." *Id.* at 775-76. Thus, when the Supreme Court in *Citibank I* held that Citibank's counterclaim was justiciable, it clearly indicated that a judgment should be reached as to the worth of that counterclaim for setoff purposes.

III. CHASE'S COUNTERCLAIMS AS TRUSTEE

We turn next to Chase's railroad equipment counterclaims. Chase asserted these two counterclaims seeking approximately $4,000,000 in its capacity as trustee for American investors who supplied railroad equipment to two Cuban railroad companies pursuant to financing leases. The district court dismissed these counterclaims principally on the ground that when suit has been brought against a defendant in one capacity, Fed. R. Civ. P. 13(b) does not permit the defendant to counterclaim in another capacity. On the present facts, we agree.[14]

Rule 13(b) states as follows:

> (b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an oppos-

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[14] We reject Chase's argument that New York law requires that its railroad equipment counterclaims be allowed. The permissibility of a counterclaim is a matter of procedure, *see* 3 Moore's Federal Practice, ¶ 13.02, at 13-57 through 13-62 and ¶ 13.18, at 13-456 (1980), which in a federal court is governed by federal, not state, law. *See Hanna* v. *Plumer*, 380 U.S. 460 (1965). The application of Rule 13 is not "outcome determinative," since it does not affect the parties' substantive rights on the railroad equipment claims, *see Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). Although the beneficiaries of the trust will not recover here, their substantive right to do so remains unaltered.

> ing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

The principal goal of the Rule, which plainly indicates that a counterclaim may be asserted against only "an opposing party," is to permit the resolution of all controversies between the parties in a single suit. *See Alaska Barite Co.* v. *Freighters Inc.*, 54 F.R.D. 192, 195 (N.D. Cal. 1972); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1420, at 112 (1971). The generally prevailing, although not uniform, view is that the "opposing party" requirement means that when a plaintiff has brought suit in one capacity, the defendant may not counterclaim against him in another capacity. *See* 3 Moore's Federal Practice ¶ 13.06[1] (1980); 6 C. Wright & A. Miller, *supra*, § 1404, at 16; *United States* v. *Timber Access Industries Co.*, 54 F.R.D. 36, 39-40 (D. Ore. 1971); *Chambers* v. *Cameron*, 29 F. Supp. 742 (N.D. Ill. 1939). *Cf.* Clark, *Code Pleading* § 104, at 671-75 (2d ed. 1947). In some instances the courts have looked beyond the capacities of the parties in order to determine who were the real parties in interest, *see* 6 C. Wright & A. Miller, *supra*, § 1404, at 17; Clark, *supra* at 672, and have allowed a counterclaim where closely similar interests were involved, *cf. Scott* v. *United States*, 354 F.2d 292 (Ct. Cl. 1965), but have dismissed the counterclaim where a clearly different person not a party was the real party in interest. *See Durham* v. *Bunn*, 85 F. Supp. 530 (E.D. Pa. 1949).

Whether a defendant who has been sued in one capacity may assert a counterclaim in a different capacity has been the subject of less discussion, but again it appears that

the traditional view is that a defendant may counterclaim only in the capacity in which he has been sued. *See id.* at 531 (dismissing counterclaims where defendant who had been sued personally was "not personally seeking relief in the counterclaim but solely in behalf of another, not party to the suit"); *Dunham* v. *Crosby*, 435 F.2d 1177, 1181 (1st Cir. 1970) (dictum).[15]

In the present case we are persuaded that the "opposing party" requirement has not been met. Banco Nacional did not sue Chase in its capacity as trustee; nor has it asserted any claims against the trust, or its assets (if any remain), or its beneficiaries. Technically, therefore, we view Banco Nacional as not a party opposing Chase as Trustee.[16]

Moreover, although we recognize that it will not always be wise to apply the "opposing party" rule mechanically, *see, e.g., Moore McCormack Lines, Inc.* v. *McMahon*,

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[15] *See also Aldens, Inc.* v. *Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), in which the court was forced to choose between competing legal fictions in order to determine whether a state Attorney General, in a suit against him challenging the constitutionality of a statute, could counterclaim on behalf of the state for a declaration that the statute was constitutional, pursuant to Rule 13(a) which generally requires that a counterclaim be asserted "against any opposing party" if it arises out of the same transaction or occurrence as the opposing party's claim. Not surprisingly, recognizing that the fundamental policy underlying Rule 13 is the expeditious resolution of all controversies arising out of the same occurrence between the same parties in a single suit, the court chose the view that the Attorney General was the alter ego of the state for these purposes.

[16] We also doubt that for purposes of the expropriation of the railroad equipment, Banco Nacional should be deemed the alter ego of the Cuban government which, for that expropriation acted through its Transportation Corporation, not through Banco Nacional. *See* our discussions today in *Banco Para el Comercio Exterior de Cuba* v. *First National City Bank, supra, and Banco Nacional de Cuba* v. *Chemical Bank & Trust Co., supra.*

235 F.2d 142 (2d Cir. 1956), we find sound reasons for not dispensing with the requirement here. First, the principal policy underlying Rule 13(b) would not be advanced by a relaxation of its requirements in this case. Since the total amount sought by the branch counterclaim and the railroad equipment conterclaims exceeds the value of Banco Nacional's claim and would be assertable only as a setoff, the railroad equipment counterclaims, if proved, would not be extinguished by this suit, but could be asserted in other litigation should the Cuban government bring an appropriate suit. *See* Restatement (Second) of Judgments § 56 (Tent. Draft No. 1, 1973).[17] Hence, allowance of the railroad counterclaims would neither bring about the resolution of all controversies between the parties, nor have any effect on the possibility of multiple suits.

We note further that under the trust agreement Chase as trustee appears to have no liability to the trust beneficiaries with respect to the expropriations. Thus, the beneficiaries are the real parties in interest on the railroad equipment counterclaim. Given the absence of any claim against the trust or its beneficiaries, and the absence of

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[17] Section 56 of the Restatement (Second) of Judgments states as follows:

> (1) Where the defendant interposes a counterclaim on which judgment is rendered in his favor, the rules of merger are applicable to the claim stated in the counterclaim, except as stated in Subsection (2).
>
> (2) Where judgment on a counterclaim is rendered in favor of the defendant, but he is unable to obtain full recovery in the action because of the inability of the court to render such a judgment and the unavailability of such devices as removal to another court or consolidation with another action in the same court, the defendant is not precluded from subsequently maintaining an action for the balance due on the claim stated in the counterclaim.

any liability of Chase to the beneficiaries, we do not believe that a notion of "fair dealing" such as that which led the Supreme Court in *First National Bank* v. *Republic of China, supra,* and Justice Douglas in *Citibank I,* to allow assertion of a setoff against a foreign sovereign plaintiff, warrants a relaxation of the "opposing party" requirement.

Finally, we note that if this counterclaim is disallowed and a net judgment is therefore entered in favor of Banco Nacional, the moneys recovered will not be placed in the hands of Banco Nacional, but will be paid into an account controlled by federal authorities. *See* 31 C.F.R. Part 515, *supra.* Upon completion of a negotiated settlement between the governments of the United States and Cuba, the United States Foreign Claims Settlement Commission, which has already been directed by Congress to determine the validity of claims for losses arising from the Cuban expropriations, may be further directed to make compensation awards from a fund consisting of any settlement payments made by Cuba and any moneys accumulated by Cuba or its nationals in blocked accounts in this country prior to the settlement. 22 U.S.C. §§ 1643-43(k) (1976). Were we to allow the railroad equipment counterclaim here, so that several millions of dollars would go directly to the trust beneficiaries rather than into a claims settlement fund, the result would be to give Chase's customers a preference over other American nationals whose property was likewise expropriated without compensation. See *Banco Nacional de Cuba* v. *First National City Bank, supra,* 431 F.2d at 403-04. We decline to relax the rules in order to grant such a preference in a situation where, since there is no Cuban claim against the trust, fairness does not demand it.

The dismissal of Chase's counterclaims as trustee is affirmed.

IV. COMPENSATION FOR THE EXPROPRIATED BRANCHES

We come finally to the question of the damages to which Chase is entitled on its counterclaim for expropriation of its Cuban branches. Judge Brieant, on the premise that Chase was entitled, by analogy to concepts of eminent domain, to full compensation for its loss, awarded Chase a total of $6,904,870, calculated as follows:

Capital, net of adjustments	$ 4,370,720
Unremitted Profits	923,320
Contributions to Retirement and Thrift Incentive Plans	129,372
Banking Houses and Real Estate Appreciation Over Book Value	54,858
Premium for Going Concern Value, or "Good Will"	1,426,600
TOTAL	$ 6,904,870

505 F. Supp. at 464. Banco Nacional challenges the validity of the district court's "full compensation" premise, and contends that no award for going concern value should have been allowed.[18] We find merit in Banco Nacional's contention that no premium should have been awarded for going concern value, and this ruling obviates consideration of Chase's contention on its cross appeal that the premium should have been larger.

[18] Banco Nacional also challenges the district court's inclusion and calculation of several items in the capital value of the Chase branches. *See* 505 F. Supp. at 451-59. The district court's findings as to these items are not clearly erroneous and we see no basis for disturbing them.

Appendix D—Opinion of the Court of Appeals
Banco Nacional v. Chase Manhattan Bank

A. *Standard of Compensation*

We begin with the recognition that our task in determining the standard of compensation with respect to Chase's expropriation claims is to apply principles of international, not merely local, law. *See Banco Nacional de Cuba v. Sabbatino, supra,* 307 F.2d at 859-60. A review of this area convinces us that there are several strongly espoused views, and that international law is far from clear.

The view long held by the United States is that an alien whose property is expropriated is entitled to "prompt adequate, and effective" compensation. Described some two decades ago as "the orthodox position," Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?,* 30 Fordham L. Rev. 727, 733 (1962), this view has been known as the "Hull Doctrine" since its most celebrated expression in a communication from former United States Secretary of State Cordell Hull to the government of Mexico in 1938 on the subject of the Mexican agrarian takings. Secretary Hull's note stated the position that

> under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.

Note of Secretary of State Hull, August 22, 1938, 19 Dept. of State Press Releases No. 465, August 27, 1938 at 140. The term "adequate" has commonly been understood to mean that *full* compensation must be paid. *See* Restatement (Second), Foreign Relations of the United States § 188 (1965) (hereinafter "Restatement"); Murphy,

Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization, in III The Valuation of Nationalized Property in International Law 49, 51 (Lillich ed. 1975).

There has been some international support for the Hull Doctrine, *see* Dawson & Weston, *supra,* at 732-34; Doman, *Postwar Nationalization of Foreign Property in Europe,* 48 Colum. L. Rev. 1125, 1133-38 (1948); Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and The Soviet Government,* 36 Corn. L.Q. 31, 41 (1950); *Case Concerning The Factory at Chorzow,* P.C.I.J. Series A—No. 17 at 47-48 (1928). And the view that international law requires full compensation was adopted as recently as 1965 by the Restatement, *supra,* §§ 185-190.

As recognized by the Restatement, however, there have been contrary views, some moderate and some extreme, as to the compensation obligations of expropriating states. *Id.* § 188, Reporter's Note 1. While Dawson & Weston began their discussion from the premise that "[t]he principle of compensation itself is seldom challenged," Dawson & Weston, *supra,* at 727, some nations have taken a position at the very opposite end of the spectrum from the Hull Doctrine, arguing that an expropriating nation need pay the alien no compensation whatever.[19] The Restatement Reporters' Notes observe, for example, that on occasion some Latin American states

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[19] One version of this position, known as the Calvo doctrine, based on the writings of the nineteenth centry Argentine jurist Carlos Calvo, holds that a state need compensate aliens only to the extent that it would compensate its own nationals. If under a state's laws its nationals are entitled to no compensation for expropriated property, an alien likewise would have no right to compensation. *See* V. Hackworth, Digest of Int'l Law § 530 (1943).

> have insisted specifically that international law imposes no duty to pay compensation when property is taken pursuant to a general program of social or economic reform. See, e.g., Mexican Minister of Foreign Affairs to Secretary of State of the United States, August 3, 1938, 3 Hackworth, Digest of International Law, 657 (1942).

Restatement § 185, Reporters' Note 2. And the Supreme Court in *Sabbatino* observed as follows:

> Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of propertly reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

376 U.S. at 429-30 (footnotes omitted).

Intermediate views have been voiced for many years. For example, Sir. Hirsch Lauterpacht, while recognizing that a State clearly is bound to respect to property of aliens, suggested a rule of partial compensation for large-scale expropriations:

> [A] State is bound to respect the property of aliens. . . . [I]n cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property . . . [i]t is probable that, consistently with legal principle,

> such solution must be sought in the granting of partial compensation.

1 L. Oppenheim, International Law § 155, at 352 (8th ed. Lauterpacht 1955). This view apparently was expressed in earlier editions of Oppenheim as well, at least as early as 1948. *See* Dawson & Weston, *supra,* at 735. By 1962, some commentators were suggesting that partial compensation in large-scale nationalizations had "become more the norm than the exception." *Id.* at 738; *id.* at 734136. *See also* Murphy, *supra,* at 52 n.10: "In negotiating lump sum settlements, the [United States] Department of State has accepted less than full value, and while this fact is reported as a compromise, . . . some scholars see such 'compromises' as an acknowledgment of a norm of partial compensation."

Finally, actions taken by the General Assembly of the United Nations on this subject since 1962, while they do not have the force of law, *see* U.N. Charter art. 10, are of considerable interest. In 1962, the General Assembly adopted Resolution 1803 (XVII) entitled Permanent Sovereignty over Natural Resources. Paragraph 4 of this resolution stated a requirement of "appropriate compensation":

> 4. Nationalization, expropriation and requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases *the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measure in the exercise of its sovereignty and in accordance with international law.* In any case where the question of compensa-

> tion gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

(Emphasis added.) The adoption of Paragraph 4 was preceded by several proposals and counterproposals for its modification. *See generally* Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources,* 49 A.B.A.J. 463, 465-66 (1963). The United States proposed that Paragraph 4 state "the owner shall be paid appropriate—prompt, adequate and effective —compensation . . . ." In offering this modification, the United States Ambassador stated that it was " 'designed to make explicit what is already implicit in . . . operative paragraph 4. In view of the United States the words "appropriate compensation" can only mean prompt, adequate and effective compensation.' " Schwebel, *supra,* at 465. Apparently the Ambassador did not specify that "adequate" meant "full" compensation. Murphy, *supra,* at 52 n.10. The delegate of Madagascar, while supporting the United States's proposal, "characterized the specification of 'prompt, adequate and effective' as 'unnecessary.' " Schwebel, *supra,* at 466. Communist delegates took issue with the United States view, and the principal competing proposal was that of the Soviet bloc, proposing that there be inserted a statement that the General Assembly "Confirms the inalienable right of peoples and nations to the unobstructed execution of nationalization" without an obligation to pay compensation. *Id.* at 465. Eventually, in a spirit of compromise, all proposed modifications, except that of the Soviet bloc, were withdrawn; and the Soviet proposal was voted down. In

withdrawing the United States's proposal, the Ambassador stated that his delegation " 'was confident that the expression "appropriate compensation" in operative paragraph 4 of the draft resolution would be interpreted as meaning, under international law, prompt, adequate and effective compensation.' " *Id.* at 466. Resolution 1803 (XVII) was adopted by a vote of 87 in favor and 2 opposed, with 12 abstaining. The United States voted in favor; ten Communist countries, including Cuba, abstained.

Two features, in particular, of Paragraph 4 were heartening to the proponents of "full" compensation. First, it provided that "the owner *shall* be paid" (emphasis added), thus rejecting the view that a state had no obligation to pay compensation. Second, it provided that the compensation was to be paid "in accordance with international law." *See* Schwebel, *supra,* at 466. Nevertheless, the precise intended meaning of "appropriate" remained unclear. *See* Lillich, *Toward a Consensus or More "Rich Chaos"?,* in III The Valuation of Nationalized Property in International Law 183 et seq. (Lillich ed. 1975) (hereinafter *"Consensus or Chaos"*).

In 1973, the General Assembly[20] again spoke on the subject of Permanent Sovereignty over Natural Resources,

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[20] In 1972 the UNCTAD (United National Conference on Trade and Development) Trade and Development Board passed a resolution also entitled "Permanent Sovereignty over Natural Resources," which read in part as follows:

> [S]uch measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls

(footnote continued on following page)

in Resolution 3171 (XXVIII). The new resolution, while referring in general to Resolution 1803 (XVII), did not itself state a requirement of appropriate compensation. Adopted by a vote of 108 nations, including Cuba, in favor to 1 opposed, with 16 abstentions, including that of the United States, Resolution 3171 (XXVIII) stated that the General Assembly

> 3. Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.

In 1974, at a special session, the General Assembly adopted, without vote, Resolution 3201 (S-VII), entitled Declaration on the Establishment of a New International Economic Order. Paragraph 4(e) looked beyond a state's natural resources, and stated as follows:

> Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expres-

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within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly resolution 1803 (XVII)

. . . .

> sion of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right; . . . .

This statement made no mention whatever of Resolution 1803 (XVII) or of any duty to compensate for expropriated property.

Later in 1974, the General Assembly adopted Resolution 3281 (XXIX), which revived the concept of "appropriate compensation," but stated that it "should" be paid rather than it "shall" be paid, and made no reference to international law. Article 2 of Resolution 3281 (XXIX) stated in part as follows:

> 2. Each State has the right:
>
> * * *
>
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

The United States, with thirteen other states, proposed an amendment to Article 2, declaring that each state has the right to "nationalize, expropriate or requisition foreign

property for a public purpose, provided that just compensation in light of all relevant circumstances shall be paid." L. Henkin, R. Pugh, O. Schachter & H. Smit, International Law 698 (1980). This amendment was rejected, and the United States voted against Resolution 3281 (XXIX). The final vote was 120, including Cuba, for and 6 against, with 10 abstentions.

This overview of the actions of members of the General Assembly presents at best a confused and confusing picture as to what the consensus may be as to the responsibilities of an expropriating nation to pay "appropriate compensation," and just what that term may mean. The resolutions, the views of commentators, and the positions taken by individual states or blocs are varied, diverse, and not easily reconciled. The reporters for a revision of the Restatement currently in the drafting stage have summed it up well:

> It is difficult . . . to state in black or even gray letter what is the international law now as regards compensation for expropriated alien properties.

Restatement (Second) of Foreign Relations Law of the United States (Revised), Preliminary Draft of Introduction, at xviii (Tent. Draft No. 1, 1980).

The instant case, however, presents fewer difficulties than some we might envision insofar as the selection of a standard of compensation is concerned. We view the range of choices as including principally (1) no compensation, (2) partial compensation, (3) appropriate compensation, and (4) full compensation. We believe that neither of the first two reflects international law, and that in the circumstances of the present case there probably is no difference between the last two.

First, we reject the position espoused by some states that property may be expropriated without an obligation on the part of the nationalizing state to pay any compensation therefor. Whether or not an expropriation violates international law—and we note that the present expropriations have been held unlawful,[21] and that ruling is not here contested—we believe that the prevalent view is the traditional view, to wit, that the failure to pay any compensation to the victim of an expropriation constitutes a violation of international law. *See* 1 Oppenheim, *supra*, § 155 at 352. Further, we regard so much of the General Assembly resolutions as purports to allow expropriating states to determine both the existence and the scope of their duties to compensate aliens as not correctly reflecting international law. *See* Lillich, *Consensus or Chaos*, *supra*, at 188 n.17:

> Under generally accepted principles of international law, "[s]uch municipal self-determination of a State's international duties is legally impotent to achieve its purpose." A. Freeman, The International Responsibility of States for Denial of Justice 461 (1938). *See also* Lissitzyn, *The Meaning of the Term Denial of Justice in International Law*, 30 Am. J. Int'l L. 632 (1936): "It is hardly necessary to add that a nation cannot escape international responsibility by invoking its own domestic law."

Nor do we believe that the prevailing view is that international law never requires an expropriating state to

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[21] *See* 505 F. Supp. at 429; *Banco Nacional de Cuba* v. *First National City Bank*, *supra*, 478 F.2d at 194, and the authorities there cited.

pay more than partial compensation. Banco Nacional espouses the partial compensation contention in a way that reveals its unsoundness as a legal standard. It urges that Chase be paid 50% of the value of its branches because most of the past negotiated settlements of expropriation claims have resulted in payments at 40-60% of the value of the claims. The notion that, merely because a negotiated settlement will not result in full payment, a victim of expropriation has no right to more than partial compensation simply confuses adjudication with compromise. Partial compensation inheres in the process of negotiation and compromise; we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we would look to the results of settlements in ordinary tort or contract cases to determine the rules of damages to be applied. Were we to adopt the view pressed by Banco Nacional, either there would be no incentive for an expropriating state to negotiate a settlement, or, more likely, the prospect of a partial compensation award in a court would lead to the negotiation of a settlement at an even lower level. Carrying the process to its logical conclusion, the courts would then be asked to take into account these lower settlements in making the next adjudicated awards. We are concerned with the parties' rights and duties, and we do not believe that international law as to compensation is merely descriptive of their conciliatory actions.

As for the Hull Doctrine and the theory that full compensation is required, we are mindful that it has long been under attack by many commentators as not accurately reflecting international law. Some scholars pressed this

view prior to any of the General Assembly resolutions described above. *E.g.*, Dawson & Weston, *supra*, and authorities cited therein. And some consider this view confirmed by the history and language of the U.N. resolutions. *E.g.*, Lillich, *Consensus or Chaos, supra. See also* Murphy, *supra* at 52: "[i]f adequate compensation is taken to mean an amount equivalent to the full value of the property, it does not reflect the position or practice of a sufficient number of States to constitute a norm of customary international law"; Friedman, *National Courts and the International Legal Order*, 34 Geo. Wash. L. Rev. 443, 454 (1966): "It is nothing short of absurd to pretend that the protestation of the rule of full, prompt, and adequate compensation . . . in all circumstances is representative of contemporary international law."

It may well be the consensus of nations that full compensation need not be paid "in all circumstances," *id.*, and that requiring an expropriating state to pay "appropriate compensation,"—even considering the lack of precise definition of that term,[22]—would come closest to reflecting what international law requires. But the adoption of an "appropriate compensation" requirement would not exclude the possibility that in some cases full compensation would be appropriate. We see no reason why the two standards may

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[22] Various sets of factors to be considered in determining "appropriate" compensation have been suggested by commentators, including the nature of the enterprise, its origin, its longevity, the rate of return during the life of the enterprise, the presence or absence of an arbitrary or discriminatory quality to the taking, the value of the enterprise to the expropriating state, the value of the enterprise to the alien, and so forth. *See, e.g.*, Lillich, *Consensus or Chaos, supra* at 197-204; Murphy, *supra* at 61-62 n.29; Amerasinghe, *The Quantum of Compensation for Nationlized* [*sic*] *Property*, III The Valuation of Nationalized Property in International Law 91 et seq. (Lillich ed. 1975).

not overlap, and indeed on the facts of the present case we conclude that we need not choose between a standard of full compensation and that of appropriate compensation. Although the award we approve for Chase is less than it seeks and more than Banco Nacional would wish, we nevertheless view it as full compensation for Chase's loss, and neither more nor less than is appropriate in the circumstances.

B. *The Value of the Branches*

The principal area of dispute as to the valuation of the Chase branches is whether Chase should receive only their net asset value,[23] or whether it is entitled also to a premium for their value as a going concern. Banco Nacional contends that an award for going concern value is inappropriate. We agree.

The term "going concern value" generally refers to the proposition that the prospective buyer of a business will be willing to pay a premium over the book value of the assets in the expectation that the earnings of the business will continue and that the new owner will receive that stream of earnings. The premium is usually calculated by capitalizing the reasonably expected future earnings over an appropriate period. In support of its contention that it is entitled to receive such a premium to reflect the future earning potential of its Cuban branches, Chase points to, *inter alia*, the

[23] Obviously Banco Nacional contended that Chase's counterclaim should not be adjudicated at all, and that if adjudicated Chase should recover only 50% of its loss. But despite the statement at the tag end of its brief that Chase's Cuban property "was actually worthless," we do not understand Banco Nacional to contend that Chase is not entitled to some compensation for at least the book value of its Cuban assets.

Appendix D—Opinion of the Court of Appeals
Banco Nacional v. Chase Manhattan Bank

Foreign Claims Settlement Commission's ruling that Chase has a valid claim for the going concern value of its Cuban branches:

> [I]n this case the evaluation of the loss should not be limited to the assets of the bank branches, but should also include compensation for the *ever increasing business activities of the branches and the substantial earning potential in connection with such activities.*

In the Matter of the Claim of The Chase Manhattan Bank, N.A. (F.C.S.C. Decision No. CU-6295 Oct. 20, 1971) at 2. (Emphasis added.)

We believe that this view takes insufficient account of the acknowledged state of the Cuban economy following the revolution. As discussed in greater detail in the opinion of the district court and in the authorities cited in the introduction to Part I *supra*, the revolutionary government of Cuba sought to concentrate the means of production in its own hands, and to minimize the role of foreigners in the Cuban economy. Various measures were taken to achieve these goals. In May 1959, for example, an agrarian reform law was enacted, looking toward the nationalization of large land holdings. Thus, in a country whose economy had been founded principally on the production and export of sugar, ownership and control of the sugar production facilities passed to the government. The transaction of other business in Cuba by foreigners and the enjoyment of property rights by foreigners were sharply curtailed. New currency control regulations were imposed and gradually tightened. Alien owners of many of the businesses and members of the professional and propertied classes fled Cuba, leaving much of their property behind. As they fled, owner-

ship and control of their properties became vested in the Cuban government. And last, but no less important, less than one month after the taking of the Chase branches, Law No. 891 decreed that no further banking transactions were to be conducted with private banks.[24]

Thus, the circumstances surrounding the taking of the Chase branches were that many of Chase's actual or potential customers had had or were about to have their own businesses nationalized, that many had fled Cuba and been replaced in the ownership of their businesses and properties by the Cuban government, and that Chase's average number of deposits had declined substantially in 1959 and the first eight months of 1960, and that the government soon would decree that those who remained carry on their banking transactions only with government-owned banks. Despite the Foreign Claims Settlement Commission's vision of "ever increasing business" for the Chase branches, and of a "sub-

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[24] Law No. 891 provided in part as follows:

> *Whereas:* The creation of money and the assignment of credit should be public functions belonging exclusively to the State, in accordance with the requirements of economic planning, and should not be in the care of private enterprises which function under the profit motive and with more care for individual than for collective interests.
>
> * * *
>
> *Article 1.* The function of banking is declared a public function and in the future may only be carried on by the State through Agencies set up for the purpose in conformity with the existing provisions of the law, to the extent that they are not in contradiction with the provisions of the present Law.
>
> For the purposes of the preceding paragraph, it shall be understood that the function of banking includes all the operations carried on by banks of deposit and credit, investment and savings, mortgage, promotion and development, and in general all the other operations that may be carried on by banking institutions of any type whatsoever.

stantial earning potential" we regard the prospects of Chase's Cuban branches in September 1960 for future earnings as highly speculative. Future earnings in this case, therefore, are an inappropriate basis for an award of damages.

We recognize that the Cuban government itself continued to operate the branches as going businesses after the expropriation, but we do not consider it appropriate to make an award on this basis. As the district court noted in awarding Chase less than it requested, the deteriorating condition in Cuba and the government's intentions—short of confiscation—to drive foreign bankers out of Cuba did not violate Chase's rights. *See* 505 F. Supp. at 461. And had Cuba simply exercised its police power to order private banks to cease their banking business and allowed them to use the assets in other enterprises, there would be no justification for awarding Chase the going concern value of its branches. *Cf.*, 1 Nichols, Eminent Domain §§ 1.42[3], 1.42[7] (1980). Given the imminent decree that all banking business must be done with government banking concerns, it would appear that the tangible assets seized provided the Cuban government with virtually all it required.

In short, we see no warrant for believing that, at a time when aliens were fleeing Cuba and many foreign businesses were being abandoned or nationalized, a potential buyer with his eyes open would have paid Chase a premium in anticipation of its future Cuban earnings. This commonsense view is confirmed by the trial testimony of a former executive vice president and comptroller of Chase, who was experienced in bank acquisitions. When asked if, given the political climate in Cuba on August 1, 1960, he would have been willing to purchase a

branch of an American bank, he said, "I think it was too far gone by then, you know." We conclude that appropriate compensation to Chase does not include payment for the going concern value of its branches, and that Chase will be fully compensated by an award that excludes any amount reflecting "lost" future earnings. Accordingly the amount awarded Chase by the district court should be reduced by $1,426,600.

CONCLUSION

We reduce the amount of setoff allowed Chase for expropriation of its Cuban branches from $6,904,870 to $5,478,270, and in all other respects affirm the judgment of the district court. We remand for entry of judgment for Banco Nacional in the amount of $4,315,750, plus such prejudgment interest as may be appropriate. Payment is to be made in accordance with 31 C.F.R. Part 515, to await such disbursement as may be permitted by the appropriate authorities.

APPENDIX E

Judgment of the United States Court of Appeals for the Second Circuit dated August 4, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

80-7299

(SEAL)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and eighty-one

Present:

HON. J. EDWARD LUMBARD,
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. AMALYA L. KEARSE
Circuit Judges,

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Plaintiff-Appellee,

v.

BANCO NACIONAL DE CUBA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix E—Judgment of the United States Court of Appeals for the Second Circuit

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court.

A. DANIEL FUSARO, Clerk

/s/ ARTHUR HELLER
by Arthur Heller,
Deputy Clerk

Appendix F—Statutes and Rules

CUBAN LAW NO. 851 OF JULY 6, 1960

* * *

Law No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above referred to in Article 1 of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

ARTICLE 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the

expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

ARTICLE 5. The payment for the expropriated property shall be made after the due appraisal thereof, in accordance with the following rules to wit:

a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America."

c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule b).

d) Such annual interest as cannot be paid out of said Fund referred to above in Rule b) shall not be cumulative, but the obligation to pay it shall be deemed extinguished.

e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available thereagainst.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the bonds with which the property expropriated hereunder will be paid for.

ARTICLE 8. This law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof and shall become operative from the date of its publication in the Official Gazette of the Republic.

NOW THEREFORE: I hereby order that this law be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO
President

Fidel Castro Ruz, Prime Minister.
Rolando Diaz Astarain, Minister of the Treasury.
(Official Gazette No. 130 of July 7, 1960).

[Translation]

RESOLUTION NO. 2 ISSUED UNDER CUBAN LAW NO. 851 OF JULY 6, 1960

Resolution No. 2

Whereas: Law No. 851 of July 6, 1960, published in the *Gaceta Oficial* of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

* * *

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960.

First: To order the nationalization, by expropriation, and, consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property, of the following legal persons:

1—The First National City Bank of New York

2—The First National Bank of Boston

3—The Chase Manhattan Bank

Second: Consequently, the Cuban Government is substituted for the legal persons named in the foregoing para-

graph as to the aforesaid assets, rights and shares, as well as the assets and liabilities of the aforementioned companies.

Third: It is hereby declared that these expropriations are carried out for the reasons of public necessity and national interest stated in the "Whereas" clauses of the present Resolution.

Fourth: Pursuant to Article 3 of Law No. 851 of July 6, 1960, the President of the National Bank of Cuba is assigned to take over, with all the authority inherent in his office, the administration of the assets and banking businesses which are the subject of the action decreed in the present Resolution.

Fifth: The President of the National Bank shall designate officers of his own choosing to administer, on his behalf, the said assets and business, with no limitation whatsoever, including those of the branches or agencies of the banking institutions, and after taking over the said administration they shall notify the undersigned, who shall then assign experts to estimate the value of the confiscated assets with a view to payment thereof in the manner prescribed in Law No. 851 of July 6, 1960.

Sixth: It is hereby declared, for the purposes of the provisions of Article 3 of Law No. 13 of December 23, 1948, which created the National Bank of Cuba, that as a result of the expropriation ordered in this Resolution, the Council Member appointed by the Foreign Banks shall cease to represent the nationalized banks in the Council, without prejudice to the representation therein of other foreign banks not affected by the present Resolution.

Seventh: The President of the National Bank of Cuba is hereby authorized to issue the pertinent notices to the

legal representatives of the juridical persons affected, and to carry out the provisions of the present Resolution.

Eighth: As a result of the adjudication in favor of the Cuban Government of the businesses, assets, rights, and shares referred to in the present Resolution, the President of the National Bank of Cuba is hereby authorized to issue the pertinent directives to the Registrars of Property, Corporate and Mercantile Deeds, in order that the proper entries may be made in their registers.

Done at Habana on September 17, 1960.

Osvaldo Dorticos Torrado
President

Fidel Castro Ruz
Prime Minister

CUBAN LAW NO. 930 OF FEBRUARY 23, 1961

* * *

NOW THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact the following:

* * *

FIFTH. The National Bank of Cuba as legal successor to said State Banks and to the Agricultural and Industrial Credits Department of the Agrarian Reform Institute, both of which have been dissolved by this law, as well as to the private banks nationalized in pursuance of Law No. 851 of July 6, 1960 and Law No. 891 of October 13, 1960, and to the banking institutions which the Government has acquired under contracts shall be deemed to be subrogated to all the property, assets, rights and claims, and to be the successor to, all the obligations peculiar to the banking business, of the institutions incorporated, without requiring any formal records, deeds or endorsements to leave due record of the conveyances of property and economics, credits, and it being unnecessary to enter record of such transfers and conveyance in any register or office of record whatever.

* * *

SECTION 25 OF THE FEDERAL RESERVE ACT, 12 U.S.C. §§ 601, 604 and 604(a)

Establishment By National Banks Of Foreign Branches And Investments In Banks Doing Foreign Business

§ 601. Authorization; conditions and regulations

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, the following powers:

First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the fc gn commerce of the United States, and to act if required to do so as fiscal agents of the United States.

* * *

§ 604. Accounts of foreign branches; profit and loss

Every national banking association operating foreign branches shall cc nduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

§ 604a. Regulations authorizing exercise by foreign branches of usual powers of local banks; restrictions

Regulations issued by the Board of Governors of the Federal Reserve System under sections 601-604a of this title, in addition to regulating powers which a foreign branch

may exercise under other provisions of law, may authorize such a foreign branch, subject to such conditions and requirements as such regulations may prescribe, to exercise such further powers as may be usual in connection with the transaction of the business of banking in places where such foreign branch shall transact business. Such regulations shall not authorize a foreign branch to engage in the general business of producing, distributing, buying or selling goods, wares, or merchandise; nor, except to such limited extent as the Board may deem to be necessary with respect to securities issued by any "foreign state" as defined in section 632 of this title, shall such regulations authorize a foreign branch to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities.

SECTION 4 OF THE INTERNATIONAL BANKING ACT OF 1978, 12 U.S.C. §§ 3102(b) and 3102(j)

Rules and regulations; rights and privileges; duties and liabilities; exceptions

(b) In establishing and operating a Federal branch or agency, a foreign bank shall be subject to such rules, regulations, and orders as the Comptroller considers appropriate to carry out this section, which shall include provisions for service of process and maintenance of branch and agency accounts separate from those of the parent bank. Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions and limitations that would apply under the National Bank Act to a national bank doing business at the same location, except that (1) the requirements of section 481 of this title shall be met with respect to a Federal branch or agency if it is examined at least once in each calendar year; (2) any limitation or restriction based on the capital stock and surplus of a national bank shall be deemed to refer, as applied to a Federal branch or agency, to the dollar equivalent of the capital stock and surplus of the foreign bank, and if the foreign bank has more than one Federal branch or agency the business transacted by all such branches and agencies shall be aggregated in determining compliance with the limitation; (3) a Federal branch or agency shall not be required to become a member bank, as that term is defined in section 221 of this title; and (4) a Federal agency shall not be required to become an insured bank as that term is defined in section 1813(h) of this title.

Receivership over assets of foreign banks in United States

(j)(1) Whenever the Comptroller revokes a foreign bank's authority to operate a Federal branch or agency or whenever any creditor of any such foreign bank shall have obtained a judgment against it arising out of a transaction with a Federal branch or agency in any court of record of the United States or any State of the United States and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied that such foreign bank is insolvent, he may, after due consideration of its affairs, in any such case, appoint a receiver who shall take possession of all the property and assets of such foreign bank in the United States and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller.

(2) In any receivership proceeding ordered pursuant to this subsection, whenever there has been paid to each and every depositor and creditor of such foreign bank whose claim or claims shall have been proved or allowed, the full amount of such claims arising out of transactions had by them with any branch or agency of such foreign bank located in any State of the United States, except (A) claims that would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate legal entity, and (B) amounts due and other liabilities to other offices or branches or agencies of, and wholly owned (except for a nominal number of directors' shares) subsidiaries of, such foreign bank, and all expenses

of the receivership, the Comptroller or the Federal Deposit Insurance Corporation, where that Corporation has been appointed receiver of the foreign bank, shall turn over the remainder, if any, of the assets and proceeds of such foreign bank to the head office of such foreign bank, or to the duly appointed domiciliary liquidator or receiver of such foreign bank.

REGULATION D, 12 C.F.R. §§ 204.1 AND 204.2

§ 204.1 Authority, purpose and scope.

(a) *Authority.* This Part is issued under the authority of section 19 (12 U.S.C. 461 *et seq.*) and other provisions of the Federal Reserve Act and of section 7 of the International Banking Act of 1978 (12 U.S.C. 3105).

(b) *Purpose.* This Part relates to reserves that depository institutions are required to maintain for the purpose of facilitating the implementation of monetary policy by the Federal Reserve System.

(c) *Scope.* (1) The following depository institutions are required to maintain reserves in accordance with this Part:

(i) Any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)) or any bank that is eligible to apply to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

* * *

(5) The provisions of this Part do not apply to any deposit that is payable only at an office located outside the United States.

§ 204.2 Definitions.

For purposes of this Part, the following definitions apply unless otherwise specified:

* * *

204.2(h) "*Eurocurrency liabilities*" means: (1) For a depository institution or an Edge or Agreement Corporation organized under the laws of the United States, the sum, if positive, of the following: (i) Net balances due to its non-United States offices from its United States offices.

(ii) Assets (including participations) held by its non-United States offices or by non-United States offices of an affiliated Edge or Agreement Corporation that were acquired after October 6, 1979, from its United States offices, and

(iii) Credit outstanding from its non-United States offices to United States residents (other than assets acquired and net balances due from its United States offices), except credit extended (A) in the aggregate amount of $100,000 or less to any United States resident, (B) by a non-United States office that at no time during the computation period had credit outstanding to United States residents exceeding $1 million, or (C) to an institution that will be maintaining reserves on such credit pursuant to this part. Credit extended to a foreign branch, office, subsidiary, affiliate or other foreign establishment ("foreign affiliate") controlled by one or more domestic corporations is not regarded as credit extended to a United States resident if the proceeds will be used in its foreign business or that of other foreign affiliates of the controlling domestic corporation(s).

* * *

REGULATION K, 12 C.F.R. § 211.3

§ 211.3 Foreign branches of member banks.

(a) *Establishment of foreign branches.* A member bank may establish a foreign branch with prior approval of the Board. Unless otherwise advised by the Board: (1) A member bank that has branches in two or more foreign countries may establish initial branches in additional foreign countries after 60 days' notice to the Board; and (2) without prior approval or prior notice, a member bank may establish additional branches in any foreign country in which it operates one or more branches. Authority to establish branches through prior approval or prior notice shall expire one year from the earliest date on which it could have been exercised, unless extended by the Board. A member bank shall inform the Board within 30 days of the opening, closing or relocation of a branch and the address of a new or relocated foreign branch.

(b) *Further powers of foreign branches.* In addition to its general banking powers, and to the extent consistent with its charter, a foreign branch of a member bank may engage in the following activities so far as usual in connection with the business of banking in the country where it transacts business:

(1) Guarantee customers' debts or otherwise agree for their benefit to make payments on the occurrence of readily ascertainable events,* if the guarantee or agreement specifies a maximum monetary liability; but, except to the extent that the member bank is fully secured, it may not have liabilities outstanding for any person on account of such

* "Readily ascertainable events" include, but are not limited to, events such as nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents.

guarantees or agr ments which when aggregated with other obligations of the same person exceed the limit contained in section 5200 of the Revised Statutes (12 U.S.C. 84);

(2) Accept drafts or bills of exchange drawn upon it subject to the amount limitations of section 13 of the FRA (12 U.S.C. 372);

(3) Invest in (i) the securities of the central bank, clearing houses, governmental entities, and government-sponsored development banks of the country in which the foreign branch is located, (ii) other debt securities eligible to meet local reserve or similar requirements, and (iii) shares of professional societies, schools, and the like necessary to the business of the branch; however, the branch's total investments under this provision (exclusive of securities held as required by the law of that country or as authorized under section 5136 of the Revised Statutes (12 U.S.C. 24)) shall not exceed one per cent of its total deposits on the preceding year-end call report date (or on the date of acquisition in the case of a newly established branch that has not so reported);

(4) Underwrite, distribute, buy, and sell obligations of the national government of the country in which the branch is located, obligations of an agency or instrumentality of the national government, and obligations of a municipality or other local or regional governmental entity of the country; however, no member bank may hold, or be under commitment with respect to, obligations of the government or governmental entities of a country as a result of underwriting, dealing, or purchasing for the bank's own account an aggregate amount exceeding 10 per cent of the member bank's capital and surplus;

(5) Take liens or other encumbrances on foreign real estate in connection with its extensions of credit, whether or not of first priority and whether or not the real estate is improved or has been appraised, and without regard to maturity or amount limitations or amortization requirements of section 24 of the FRA (12 U.S.C. 371);

(6) Extend credit up to $100,000 or its equivalent to an officer of the bank residing in the country in which the foreign branch is located to finance the acquisition or construction of living quarters to be used as the officer's residence abroad, provided any such credit extension is reported promptly to the branch's home office; however, when necessary to meet local housing costs, such amount may be exceeded with the specific prior approval of the member bank's board of directors;

(7) Act as insurance agent or broker;

(8) Pay to an employee of the branch, as part of an employee benefit program, a greater rate of interest than that paid to other depositors of the branch; and

(9) Engage in repurchase arrangements involving commodities and securities that are the functional equivalent of extensions of credit.

(c) *Other permissible activities.* A member bank that is of the opinion that activities other than those specified in this section are usual in connection with the transaction of the business of banking in the places where its branches transact business may apply to the Board for permission to engage in such activities.

(d) *Reserves.* Reserves shall be maintained against foreign branch deposits when required by Part 204 of this chapter (Regulation D).

Appendix F—Statutes and Rules

REGULATION Q, 12 C.F.R. § 217.0

§ 217.0 Scope of part.

(a) This regulation is issued under authority of provisions of section 19 of the Federal Reserve Act which, together with related provisions of law, are cited in the note preceding this section.

(b) This part relates to the payment of deposits and interest thereon by member banks of the Federal Reserve System and not to the computation and maintenance of the reserves which member banks are required to maintain against deposits. The rules concerning reserves of member banks are contained in Part 204 of this chapter.

* * *

(d) The provisions of this part do not apply to any deposit that is payable only at an office located outside of the States of the United States and the District of Columbia of a member bank or of a foreign bank.

UNIFORM CUSTOMS AND PRACTICE FOR COMMERCIAL DOCUMENTARY CREDITS (ICC BROCHURE NO. 151) (1951 REVISION), ARTICLES 5 AND 10

The provisions, definitions, interpretations, etc. contained in the following Articles are to be understood as uniform directions applying to all commercial documentary credits including authorities to pay, accept, negotiate or purchase, unless otherwise agreed.

It is essential that instructions embodied in commercial documentary credits be complete and precise in every way and any attempt to include technical terms or cumbersome details should be discouraged in order to guard against the possibility of confusion and misunderstanding.

The beneficiary of a credit can in no case avail himself of the legal relations existing between Banks, or between the applicant for the credit and his Bank.

* * *

ARTICLE 5

Irrevocable credits are definite undertakings by an issuing Bank and constitute the engagement of that Bank to the beneficiary or as the case may be, to the beneficiary and bona fide holders of drafts drawn thereunder that the provisions for payment, acceptance or negotiation contained in the credit, will be duly fulfilled provided that the documents or as the case may be, the documents and the drafts drawn thereunder comply with the terms and conditions of the credit.

When the issuing Bank instructs another Bank to confirm its irrevocable credit and when the latter does so, the confirmation implies a definite undertaking of the confirming Bank as from the date on which it gives confirmation.

In case of credits available by negotiation of drafts, the confirmation implies only the undertaking of the confirming Bank to negotiate drafts without recourse to drawer.

Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

When a correspondent is instructed by cable or telegram to notify a letter of credit, the issuing Bank must send the original of the said letter of credit to the said correspondent if it is intended to put the document itself into circulation. If any other procedure were followed, the issuing Bank would be responsible for all consequences which may result therefrom.

ARTICLE 10

In documentary credit operations, all parties concerned deal in documents and not in goods. Payment, negotiation or acceptance against documents in accordance with the terms and conditions of a credit by a Bank authorized to do so binds the party giving the authorization to take up the documents and reimburse the Bank making the payment, negotiation or acceptance.

If the documents, on their face, are not as stipulated by the terms and conditions of the credit, the issuing Bank must, upon receipt of the documents determine, on the basis of the documents alone, whether or not to claim that payment, negotiation or acceptance was not made in accordance with the terms and conditions of the credit.

If such claim is to be made, notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means to the Bank demanding reimbursement and such notice must state that the documents are being held at the disposal of such Bank or are being returned thereto. The issuing Bank shall have a reasonable time to examine the documents.

APPENDIX G

List of Affiliates

As indicated in the List of Parties appearing in the within Petition for Writ of Certiorari, petitioner is the wholly-owned Edge Act subsidiary of The First National Bank of Boston, which is in turn wholly-owned by First National Boston Corporation. The partially-owned affiliates of The First National Bank of Boston and its parent are listed below:

Boston Bank Cameroon; Banco de Boston Dominicano, S.A. (Dominican Republic); Nigerian American Merchant Bank Ltd.; First Leasing and Finance Ltd. (Australia); Consolidated Leasing (Queensland); Boston Industrial Lease (Queensland); International Lawrie Factors Holding, Ltd.; Boston Leasing Limited; Boston Industrial Lease (S.A.); Societe Francaise de Factoring/International Factors France (France); International Factors Espanola S.A. (Spain); P.M.H. Boston (Brazil); International Factors Ltd. (United Kingdom); Independent Factors Limited; Alex Lawrie Factors Ltd.; S.A. International Factors (Belgium); Compania de Credito, S.A. (Honduras); Sodril, S.A. (Brazil); Confidential Invoice Factors Limited; Confidential Invoice Discounting Limited; Alex Lawrie Receivables Financing Ltd.; Alex Lawrie Computer Services Ltd.; Exteleasing, S.A. (Spain); Servicios Comerciales e Industriales S.A. (Guatemala); Tarjetas de Credito de Guatemala, S.A. (Guatemala); and Asesores Tecnico Administrativo, S.A. (Guatemala).

Opposition

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No. 81-982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),
Petitioner,

v.

BANCO NACIONAL DE CUBA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 22, 1982

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Proceedings Below

The complaint herein sets forth two causes of action. The first is based on the contention that by a Cuban decree nationalizing petitioner's branch in Havana,[1] respondent assumed a legal obligation of that branch to petitioner. The second cause of action was for breach of an express contract between petitioner and respondent.

The district court found no merit in either cause of action, but *sua sponte* ruled that petitioner could recover on a theory of unjust enrichment. On appeal the court of appeals agreed with the district court that there was

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[1] Petitioner is a New York corporation suing as assignee of First National Bank of Boston, a Massachusetts corporation. Both corporations will be referred to as petitioner or as the Boston bank.

no merit in the first cause of action alleged in the complaint,[2] and reversed the opinion of the district court, finding no valid claim of unjust enrichment.

Reasons For Denial of the Writ

1. Point I of the petition is founded on the premise that, on the facts of this case, petitioner and its Cuban branch were separate entities, of such a nature that a legal obligation, enforceable by an action at law, could have existed between them. It is petitioner's contention that such legal obligation was assumed by respondent when petitioner's branch was nationalized. If there was no such legal obligation, the first cause of action alleged in petitioner's complaint must fall.

There is no significant authority supporting petitioner's position, as both the district court and the court of appeals held; the law is clear to the contrary.

Petitioner concedes (Petition, p. 14) that a foreign branch of a domestic bank is not "legally distinct from its head office for all purposes." It argues, however, first that it should be treated as distinct "for arm's length commercial transactions" (Petition, p. 16), and second, that the court of appeals decision to the contrary overturns a construction of 12 U.S.C. § 604 "that had been relied upon for more than half a century" (Petition, p. 14). In support of the latter contention, petitioner cites eight cases, the most recent of which is in 1965 (Petition, p. 14, footnote).

Petitioner errs. For the reasons set forth in the court of appeals opinion at pages A11-A13, and in the district court

[2] The second cause of action was abandoned in the court of appeals and is not presented here.

opinion at pages A26-A29,[3] and elsewhere in the record in this case, the head office and its branch were not separate entities. The cases and other authorities cited by petitioner do not hold to the contrary.

The record shows that in 1923 petitioner established a branch office in Havana and subsequently established five sub-branches, in Havana and other cities in Cuba (J.A. 28). The capital of the Cuban branch office was $3 million which was supplied by petitioner in the form of United States government bonds, kept in Havana in the name of petitioner (J.A. 32, 75). The only name on the front of the Cuban offices was the Spanish equivalent of "First National Bank of Boston Organized in 1789" (J.A. 48).

As required by the provisions of 12 U.S.C. § 604, the accounts of the Cuban branch were maintained separately from those of the Boston bank. However, profits derived from the operations of the Cuban branch were remitted to the Boston bank (J.A. 41). Income tax to the United States included profits (or losses) of the Cuban branches (J.A. 595-596), and in terms of the tax paid, "it made no difference whether the dollar was earned in Havana or Boston" (J.A. 89). In petitioner's annual reports to the Comptroller of the Currency, the earnings of all overseas branches were lumped together, no separate breakdown being given for the Cuban branch as distinguished from branches in Argentina and elsewhere (J.A. 87). Petitioner claimed and received an income tax deduction for losses resulting from the nationalization of the Cuban branch (J.A. 88-89).

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[3] References prefixed "A" are to the Appendix submitted by petitioner. References prefixed "J.A." are to pages in the Transcript of the Record presented to the court of appeals in the form of a Joint Appendix. A copy of that Joint Appendix will be lodged with the Clerk, for the convenience of the Court.

The Cuban branch was not incorporated. It had no President or Board of Directors of its own (J.A. 594), but its operations were directed by three senior officers, one of whom was a Vice President of the petitioner who acted pursuant to a power of attorney issued by the Boston bank (J.A. 161, 593).

Personnel for the Cuban branch were recruited by the head office in Boston (J.A. 64, 67, 159). The original management group was chosen by the head office (J.A. 67) and vacancies in the group were filled by the management group in consultation with the head office. When the Cuban branch was nationalized, Mr. North, petitioner's lead witness, moved back to Boston where he had worked prior to his assignment in Havana, and until his retirement in 1970 he worked for the head office as Deputy Controller for Overseas Operations (J.A. 60). Another witness, Mr. Gornall, had likewise worked for the head office before he went to Havana; after nationalization he was asked by petitioner to work at petitioner's branch in Argentina; at the time of trial he worked for petitioner's branch in Nassau. (J.A. 106, 158, 196).

In actual operations also, the head office and its Cuban branch in no sense did business "at arm's length" if such a concept is even conceivable in the circumstances. The head office "automatically" confirmed letters of credit when the request for confirmation came from the Cuban branch, the reason being that, in view of the political situation in Cuba, many shippers were not willing to accept letters of credit without head office confirmation and petitioner was anxious to enable its Cuban branch to service customers (J.A. 218). Quite a different standard was used in confirming requests for confirmation of letters of credit coming from unaffiliated banks. In those circumstances, it would depend on the risk involved and whether the requesting bank

was "a solid bank," one of the "great banks" (J.A. 245-251). Requests to confirm coming from a bank of a country "in the midst of trouble" would present "an entirely different situation." (J.A. 249)

A bank is not juridically distinct from its unincorporated branch under New York law.[4] See *In Re Goebel's Estate*, 295 N.Y. 73, 80 (1946). ("[T]he Corn Exchange Bank Trust Company is a single corporation, and was the sole debtor, no matter how many branches it maintained"); *Sokoloff* v. *National City Bank of New York*, 130 Misc. 66, 73, 224 N.Y.S. 102 (S.Ct. 1927), *aff'd.*, 250 N.Y. 69, 164 N.E. 745 (1928); ("[W]hen considered with relation to the parent bank [foreign branches] are not independent agencies; they are, what their name imports, merely branches, and are . . . instrumentalities whereby the parent bank carries on its business . . . and their business conduct and policies are controlled by the parent bank, and their properties and assets belong to the parent bank . . ."); *Cable and Wireless, Ltd.* v. *Yokohama Specie Bank*, 191 Misc. 567, 79 N.Y.S.2d 597 (S.Ct. 1948), *modified*, 103 N.Y.S.2d 1016 (1st Dept. 1951), *aff'd.*, 304 N.Y. 574 (1952) (branch held liable on unaccepted draft drawn upon it by parent bank, because bank-drawer and branch-drawee are identical); *Yokohama Specie Bank, Ltd.* v. *Milbert Importing Co.*, 44 N.Y.S.2d 71, 73 (S.Ct. 1943) (transfer of bills of exchange from bank to branch could not constitute negotiation from one holder to another because bank and branch were the same entity); *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616 (1959), *cert. denied*, 361 U.S. 948.

The relationship of a parent bank to its branches has been the subject of many rulings by the Federal Reserve System,

[4] There is apparent agreement between the parties that New York law applies on this issue. Respondent so argued in the district court and petitioner does not disagree.

and they uniformly support the conclusion that a parent bank and its branches form a single entity. See, for example, the Interpretations of the Board of Governors of the System, § 5600; 3 Federal Reserve Bulletin 198, 199 (1917); 7 Federal Reserve Bulletin 815 (1921). In 1978 a press release issued jointly by the Federal Reserve Board, the Controller of the Currency, and the Federal Deposit Insurance Co. stated that:

> [S]ince a branch is legally part of the parent, credits to a branch are treated as being guaranteed by the head office.[5]

The cases cited by petitioner in its footnote at page 14, with a single exception, relate to the situs of an account, and even on this narrow question they do not support petitioner's position. *First National City Bank* v. *IRS*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1961), holds that a subpoena addressed to the head office of First National City Bank in New York could require the production of the records of a depositor in the Panamanian branch of the bank and to the extent to which it has any bearing on the issues before the court, that decision supports respondent's contention. *United States* v. *First National City Bank*, 379 U.S. 378 (1965), *reversing*, 321 F.2d 14 (2d Cir. 1963), upholds an injunction against First National City Bank restraining it *pendente lite* from allowing a depositor in its Uruguayan branch to withdraw funds from an account in that branch; this decision likewise supports respondent.[6]

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[5] Country Exposure Lending Survey, Federal Reserve Board Press Release, December 7, 1978.

[6] Petitioner cites the Supreme Court as reversing the court of appeals in this case "on other grounds." We see no reason for such qualification.

Respondent also cites *McCloskey* v. *Chase Manhattan Bank*, 14 App. Div. 2d 768, *aff'd.*, 11 N.Y.2d 936 (1962). No opinion was written in that case but on the facts as set forth in the court's memorandum, the court refused to permit an attachment served on the New York office of Chase Manhattan Bank to be effective as against a depositor's account in Chase's branch office in Frankfurt. No reason is given for that result, but it may be assumed that the rule rests on the notion that to "require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community" since the head office could not know the exact state of the accounts in all of its branches. *United States* v. *First National City Bank, supra* 321 F.2d at 22. That argument evidently did not find favor in this Court when it reversed the court of appeals in the latter case.

This policy consideration has no relevance to the instant case, and in any event, technology has made it obsolete. So the district court in New York recently specifically refused to follow this line of argument in *Digitrex, Inc.* v. *Johnson*, 491 F. Supp. 66 (D.C. N.Y. 1980), saying, at p. 68:

> Today, Manufacturers Hanover, along with most other large commercial banks in New York City, uses high-speed computers with central indexing capabilities to keep track of its depositors' checking accounts. The employment of these computers, together with other sophisticated communications equipment, has enabled the Bank to monitor checking accounts *from its main office*. This, in turn, has permitted the centralization at the main office of many administrative functions, such as the imposition of a hold on a depositor's account. Under these circumstances, service of a restraining notice at the Bank's main office promotes,

rather than endangers, the orderly transaction of banking business. (emphasis in original)

The other cases cited by petitioner likewise relate to the situs of an account and all of them are clearly motivated by the burden which it was thought would be put on the banking community as of 20 or 30 years ago.[7] Problems arising out of the difficulties the head office of a bank may have in controlling the accounts of branch office customers have not the slightest relevance to the much broader aspect of the relationship of head office and branch raised by this case.

The one case cited by petitioner which seems to address itself to a matter of substance is a prior decision of the Second Circuit in *Pan American Bank & Trust Co.* v. *National City Bank of New York*, 6 F.2d 762 (1925), *cert. denied*, 269 U.S. 554. As the court of appeals pointed out (A12), the few sentences upon which petitioner heavily relies has no relationship to the issues or decision in that case. Dictum in this half-century old case has been cited several times in past decades but, so far as we can see, has never been followed.

2. Once the petitioner's separate entity theory is disposed of, this is a simple nationalization case, within the decision in *Banco Nacional* v. *Sabbatino*, 376 U.S. 398. Indeed, nationalization is the prototype act of state to which the act of state doctrine applies. *Carey* v. *National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978),

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[7] *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742 (Civ. Ct. N.Y. Cty., 1931) and *Chrzanowska* v. *Corn Exchange Bank*, 173 A.D. 285, aff'd., 225 N.Y. 728 (1919), both cited by petitioner (fn. p. 14), were held not to apply to transactions between the head office and its foreign branch in *Cable & Wireless, Ltd.* v. *Yokohama Specie Bank*, *supra*.

aff'd., 592 F.2d 673 (2d Cir. 1979). See also *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984.

Resolution No. 2 nationalized all the assets, and rights of the petitioner located in Cuba, including any assets or rights arising out of the letter of credit transactions which are the subject of petitioner's claim. These assets included the pesos already paid to Cuban branch by most of its letter of credit customers, as well as the contractual right to collect payment of the pesos from the remainder. As these were assets and rights located in Cuba, they were clearly nationalized. The district court agreed, finding that, pursuant to the nationalization decree, "Banco Nacional became entitled to and did collect the avails of the customers' side of the letter of credit transaction in pesos . . ." (A25).

The district court, and now the petitioner, seek to avoid the application of the act of state doctrine by reference to the theory of unjust enrichment. The first mention of this concept appears in the district court opinion. It rests on the premise that Banco Nacional was unjustly enriched when it seized those assets of the branch which related to the letter of credit transactions, *i.e.*, the pesos paid to the branch by its Cuban customers and the contractual right to collect funds due from those customers. We fail to see how the theory of unjust enrichment stands in any better footing than any other claim for property seized by the nationalization measure.

Petitioner relies exclusively on the authority of *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682. The reliance could not be more misplaced. Here, unlike *Dunhill*, the act of state is not the refusal to repay petitioner; it is the nationalization itself. The Republic of

Cuba (and Banco Nacional) nationalized the property rights upon which the petitioner sues by virtue of Resolution No. 2. In contrast, this Court's decision in *Dunhill* was premised upon a finding that the property at issue there was not nationalized at all. In the present case, the district court specifically found that the "situs of these claims was and is in Cuba," and that, by virtue of the nationalization, Banco Nacional became entitled to collect them (605). The Court of Appeals agreed, and petitioner does not argue to the contrary.

To follow this finding by a holding that petitioner can recover its property because respondent has been "unjustly enriched" would make the act of state doctrine meaningless; in any nationalization situation, the nationalizing government is, arguably, enriched unjustly.

3. One additional point should be made. Although this proceeding may not be, in a technical sense, moot, it is certainly academic, in that even if petitioner should be awarded a judgment against Banco Nacional, execution on that judgment is forbidden by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* Section 1609 of the Act reads as follows:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

Section 1610 provides that property used for a commercial activity may be subject to attachment or execution.

Section 1611 reads, so far as relevant, as follows:

(b) . . . the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; . . .

There are no funds of the respondent in the United States except funds held by the respondent in its own name and for its own account.

Respondent argued below that it was not subject to the jurisdiction of the court under the Foreign Sovereign Immunities Act; the Court of Appeals did not pass on that contention, finding it unnecessary to do so. But even if the court had jurisdiction of the action, execution upon funds of the respondent is impossible under Section 1611 of the Act. No judgment awarded to petitioner would be enforceable under the Act.

Nor is this all. All property of respondent in the United States is frozen pursuant to the provisions of the Cuban Assets Control Regulations, 31 C.F.R. § 515.101, *et seq.* Execution against such property is prohibited without license. §§ 515.201; 515.310. The possibility that the Treasury Department might issue a license is very remote, since the very purpose of the freeze was to hold Cuban property safe from the claims of creditors pending the possibility of a settlement of nationalization claims.

CONCLUSION

Petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-982

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Having failed to address the adverse impact of the Court of Appeals' decision in this case on foreign branch banking by national banks as a matter of federal banking law and policy, Banco Nacional attempts to obscure the significance of this Court's review here by suggesting that the dispute between the parties is largely academic because the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1930, 1602-1611 (the "FSIA"), and the Cuban asset freeze imposed in 1963, would render impossible execution on any judgment obtained by petitioner (Brief in Opposition at 10-11).* There is no merit to this contention.

* Because of its decision on the merits, the Court of Appeals did not reach Banco Nacional's claim on appeal that the FSIA should be applied retroactively here, 658 F.2d at 900 n.6 (A11), and that claim was not addressed in the Petition.

POINT I

Banco Nacional Is Precluded By Waiver and Laches from Claiming Immunity Under the FSIA or Otherwise.

Petitioner obtained an order of attachment in this action on April 21, 1961, more than two years prior to the Cuban asset freeze, and more than fifteen years prior to the enactment of the FSIA. At no time until after petitioner sought a stay of mandate in this case in October 1981 did Banco Nacional ever contend that its assets in this country were immune from execution under the FSIA or otherwise.

Moreover, at no time has Banco Nacional properly asserted sovereign immunity as a defense in this action, having failed to do so (a) in its original answer in 1961, (b) in its amended answer in 1961, (c) in its second amended answer filed on the eve of trial in 1972 (when it asserted its act of state defense for the first time), or (d) at any time thereafter. In view of Banco Nacional's twenty years of inaction, it would be difficult to conceive of a more compelling case of waiver.

The law is clear that sovereign immunity is an affirmative defense that is waived if not pleaded in a timely manner. This was the law prior to the enactment of the FSIA (*see, e.g., Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916); *Flota Maritima Browning de Cuba, S.A.* v. *Snobl*, 363 F.2d 733, 737 (4th Cir.), *cert. denied*, 385 U.S. 837 (1966)), and sovereign immunity remains an affirmative defense under the FSIA that must be pleaded and proved. 28 U.S.C. § 1605(a)(1). The filing of a responsive pleading in an action without raising sovereign immunity constitutes an implied waiver of that defense. *Behring International, Inc.* v. *Imperial Iranian Air Force*, 475 F. Supp.

383, 389, n.16 (D.N.J. 1979) (citing H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 14 *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604, 6616); *Harris* v. *VAO Intourist, Moscow*, 481 F. Supp. 1056, 1058 (E.D.N.Y. 1979); *see generally* Fed. R. Civ. P. 12(h).

Furthermore, because the FSIA did not create the doctrine of sovereign immunity, no right to assert the defense for the first time was created by that Act. *See, e.g., Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 629 F.2d 786, 791 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). Even if that were not the case, Banco Nacional again waived any right to claim the defense by failing to assert it in a timely manner after the passage of the FSIA. In early 1978, the district court advised Banco Nacional that if it claimed the FSIA should be applied to the facts of this case, then it should file an appropriate motion. No such motion was ever filed, and Banco Nacional first briefed the question on appeal.

Banco Nacional's claimed immunity from execution under the FSIA stands on the same footing as its claimed immunity from jurisdiction. *Flota Maritima Browning de Cuba, S.A.* v. *Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 626-27 (4th Cir. 1962). In the face of petitioner's attachment, Banco Nacional stood silent for more than twenty years, first raising a claimed immunity from attachment only after the Court of Appeals rendered its decision in this case. Evidence of waiver, together with laches, is almost overwhelming.

Moreover, as shown below, the courts have consistently declined to apply the FSIA retroactively when the effect would be to abrogate antecedent property rights, such as those represented by petitioner's attachment here. *Amoco Overseas Oil Co.* v. *Compagnie Nationale Algerienne de*

Navigation, 605 F.2d 648, 654 (2d Cir. 1979) (preventing the retroactive perfection of an attachment lien would "prejudice very substantial antecedent rights of the appellees"). Even when courts have applied the FSIA retroactively, they have relied on the fact that the contemplated application of the FSIA would not abrogate antecedent rights of the parties. *Yessenin-Volpin* v. *Novosti Press Agency,* 443 F. Supp. 849, 851 n.1 (S.D.N.Y. 1978); *National American Corp.* v. *Federal Republic of Nigeria,* 448 F. Supp. 622, 639 (S.D.N.Y. 1978), *aff'd,* 597 F.2d 314 (2d Cir. 1979).

In the instant case, plaintiff obtained an order of attachment on April 21, 1961. Banco Nacional's property became subject to that attachment at the moment the order was served on the garnishees. N.Y. Civ. Prac. Law § 6214(b). The interest that was created in Banco Nacional's property by the attachment obtained is in the nature of a lien or vested right. *See Holyoke* v. *Adams,* 1 Hun. 223, 224 (1st Dep't), *aff'd,* 59 N.Y. 233 (1874); *West Virginia Pulp & Paper Co.* v. *Peoples Home Journal, Inc.,* 233 A.D. 376, 378 (1st Dep't 1931); *Reich* v. *Spiegel,* 208 Misc. 225 (Sup. Ct. N.Y. Cty. 1955); *see also Orvis* v. *McGrath,* 198 F.2d 708, 709-10 (2d Cir. 1952), *aff'd sub nom. Orvis* v. *Brownell,* 345 U.S. 183, 188 (1953). To apply the FSIA retroactively in this case in such a way as to allow Banco Nacional to interpose sovereign immunity at this late date, whether as a defense or otherwise, would thus unconstitutionally abrogate a long-vested property right. *See, e.g., Societe Internationale Pour Participations Industrielles et Commercialles, S.A.* v. *Rogers,* 357 U.S. 197, 209-11 (1958); *Guessefeldt* v. *McGrath,* 342 U.S. 308, 317-18 (1952).

Nor does the Cuban asset freeze interpose a certain bar to execution here, where petitioner's attachment was obtained more than two years prior to the imposition of the

freeze. In the recent case involving the Iranian settlements, *Dames & Moore* v. *Regan,* 101 S. Ct. 2972, 2983, 2984 n.6 (1981), this Court was careful to recognize that the petitioner in that case had obtained its attachment *after* the freeze order. 101 S. Ct. at 2983, 2984 n.6. Furthermore, the Court's decision recognizes by implication that the abrogation of the property right inherent in a pre-freeze attachment could give rise to a compensable taking under the Fifth Amendment. 101 S. Ct. at 2984 n.6, 2991-2992. At the very least, the validity of a pre-freeze attachment is an open question. *Orvis* v. *Brownell,* 345 U.S. 193, 188 (1953). Moreover, a future settlement with Cuba could leave pre-freeze attachments intact, or require payment of judgments in favor of or against Cuba. *Electronic Data Systems Corp. Iran* v. *Social Security Organization of the Gov't of Iran,* 651 F.2d 1007, 1011 (5th Cir.), *cert. denied,* 101 S. Ct. 3067 (1981).

Finally, any litigation involving a sovereign is likely to raise questions concerning the sovereign's amenability to execution, and any uncertainty in that regard should not be a barrier in any way to review by this Court. *Cf. Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682 (1976). Under Banco Nacional's reading of the FSIA, any litigation against a foreign central bank and many sovereign entities, however meritorious, would be "academic" because of the uncertainty of successful execution. But it is by no means clear that a responsible sovereign will categorically refuse to pay a judgment duly entered against it whatever the circumstances. If that is the declared policy of the Cuban Government, a fair question is raised whether a Cuban entity should be entitled at all to claim any form of immunity under the FSIA.

POINT II

Banco Nacional Has Not Addressed the Policy Implications of the Court of Appeals' Decision.

As noted in the Petition at page 11 n.*, on September 29, 1981 the United States Court of Appeals for the Second Circuit issued a second decision which treats a national bank and its foreign branches as a single entity for *all* purposes, notwithstanding statutory, regulatory and case law treatment to the contrary. *Vishipco Lines* v. *The Chase Manhattan Bank, N.A.*, No. 81-7052 (2d Cir., filed Sept. 29, 1981). We have been advised by counsel for Chase that a Petition for a Writ of Certiorari seeking review by this Court of that decision will be filed in the near future. Accordingly, because this case and *Vishipco* raise important and related issues with respect to the status of foreign branch banks, petitioner respectfully requests that the respective petitions for certiorari be considered together. Read together, the decisions of the Court of Appeals in this case and in *Vishipco* reflect a misunderstanding of fundamental banking practice under federal law and regulation and sharply and unnecessarily increase the risks inherent in international banking operations.

As indicated above, Banco Nacional has completely failed to address the implications posed by the Court of Appeals' decision in this case for foreign branch banking by national banks (*see* Petition at pp. 9-20). FNB Boston's relations with its Cuban Branches in respect of the letters of credit at issue here were typical of the relations of any head office with its foreign branches. Moreover, in confirming letters of credit issued by its Cuban Branches, FNB Boston acted with respect to those branches in a way not materially different from the way it acted in dealing with unrelated

foreign correspondent banks with which it had an established banking relationship.

After indicating at trial that FNB Boston continued as a matter of course to confirm letters of credit issued by its Cuban Branches up to the time of expropriation, petitioner's witness was asked whether FNB Boston would refuse to confirm a letter of credit issued by an unrelated bank where the political situation in the country where the unrelated bank was located was such as to indicate a high degree of risk. Petitioner's witness answered in the negative and, after describing the circumstances that ordinarily give rise to a request to confirm, explained that it was an established banking relationship, whether with a branch or with an unrelated correspondent pursuant to a line of credit or other contractual arrangement, that determined FNB Boston's willingness to confirm a letter of credit issued abroad to finance exports from the United States.

Petitioner's witness was then asked whether FNB Boston had any significant business with other Cuban banks with respect to letters of credit and he indicated there was *none*, principally because the Cuban Branches were *competitors* of the other Cuban banks, who typically sent their letter of credit business to their own correspondents in the United States. The Court of Appeals' decision, by placing a letter of credit confirmed for the account of an unrelated correspondent on a materially better footing than a credit confirmed for the account of a bank's own branch, effectively undermines this competition.

Under the Court's decision, a United States bank is discouraged from working with its own foreign branch, its most natural indigenous correspondent, in the financing of United States exports to the country in question. This result is directly contrary to the Congressional policy of fostering

the United States export trade through a United States banking presence abroad which led to the establishment of foreign branch banking in the first place pursuant to Section 25 of the Federal Reserve Act (*see* Petition at pp. 11-15).

CONCLUSION

This case raises important questions under federal law relating to the status of foreign branches of national banks. Accordingly, it is respectfully requested that the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Dated: New York, New York
January 27, 1982

Respectfully submitted,

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No. 81-982

In the Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL), PETITIONER

v.

BANCO NACIONAL DE CUBA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1923, the First National Bank of Boston ("FNBB") opened a branch in Havana, Cuba. Along with several sub-branches, the branch operated until September 17, 1960, when it was expropriated by the revolutionary Cuban government (Pet. App. A4, A20). The Cuban branch was unincorporated—as it was required to be under relevant United States law at the time—and did business in its parent's name. The branch also was capitalized by FNBB with $3 million in United States government bonds. Although the branch did not have a separate board of directors or president, it was substantially autonomous, being managed

by a group of officers who supervised its daily operations, made all hiring decisions, and, through a three-member committee, decided questions of policy. The branch engaged in a variety of banking transactions and did business with banks other than FNBB. The branch kept its own books, did business as a separate profit center, and leased or paid for its offices and equipment out of its own operating funds (Pet. App. A4, A11, A21, A27). Pursuant to statutory requirements, FNBB kept separate accounts on its books for the branch's operations and included the branch's profits in its financial statements as a separate item. The branch paid Cuban taxes; however, it remitted its profits to FNBB in Boston. FNBB paid United States taxes on the branch's profits (*id.* at A4).

FNBB and the branch frequently engaged in letter of credit transactions in connection with the export of goods from the United States to Cuba. Those transactions were typical of letter of credit transactions generally. Cuban businesses planning to import goods from the United States would apply to the branch for a letter of credit to guarantee payment of a specified amount to the exporter in the United States. After reviewing the Cuban importer's letter of credit application and obtaining the necessary foreign exchange authorizations, the branch would issue the letter of credit in the amount requested and send the letter to FNBB in the United States. Ordinarily, the branch first would require the Cuban importer to deposit a sum in pesos equal to the amount of the letter (Pet. App. A5-A6).

Upon receiving the letter of credit, FNBB would confirm the letter, then send the letter and its confirmation to the American exporter designated as the letter's beneficiary. After the exporter shipped the goods to Cuba, it would present the letter and the shipping documents covering the exported goods to FNBB against payment (in dollars) of the amount of the letter. At the time it paid the exporter,

FNBB would debit a dollar-denominated account the branch maintained in Boston for the amount of the payment and would then send the letter, the shipping documents, and the debit notice to the branch. When the exported goods arrived in Cuba, the Cuban importer would obtain the shipping documents from the branch, first settling whatever amounts it owed to the branch under the letter. For its part, the branch would convert the pesos it had received from the importer into dollars and remit the dollars to FNBB to replenish its dollar account. The frequency of the branch's letter of credit transactions was such that the branch converted pesos and transmitted the resulting dollars to Boston on a daily basis (Pet. App. A5-A6). Petitioner states that it dealt with the branch in the same manner as it dealt with unrelated Cuban banks, even to the point of charging the branch the customary fee for confirming letters of credit (Pet. 8).

2. This case arose from 324 letters of credit that the branch issued, and FNBB confirmed, prior to September 17, 1960, the date Cuba expropriated the branch. On September 15 and 16, 1960, FNBB's home office paid in excess of $175,000 to American exporters under the branch's letters of credit; after the expropriation, FNBB paid another $1,500,000 to exporters under the letters. As to the post-September 17 payments, FNBB requested, but did not obtain, assurances from respondent that it would be reimbursed for its payments. FNBB attempted to protect itself from loss by withholding from the Cuban importers the shipping documents that they ordinarily would have needed to obtain the exported goods; however, because of action by the revolutionary Cuban government, the importers were able to obtain release of the goods without tendering the shipping documents (Pet. App. A6).

The revolutionary Cuban government expropriated the branch on September 17, 1960. Pursuant to the expropriation decree, ownership of the branch was transferred to the Cuban government, which expressly succeeded to the branch's assets and liabilities. The expropriation decree further provided that respondent Banco Nacional de Cuba was to administer the branch (Pet. App. A7-A8).

3. In 1961, petitioner, the assignee of FNBB's claims, brought this action in the United States District Court for the Southern District of New York for the amounts owing under the letters of credit. The district court rejected petitioner's contention that the amounts it claimed from its branch under the letters of credit were "liabilities" that Cuba had assumed upon nationalizing the branch. The court reasoned that FNBB could not have been owed money by the branches because FNBB and the branches were one and the same to begin with. Instead, the court held that any "debt" the branch owed FNBB was the result of an "internal bookkeeping procedure, and the lack or failure of reimbursement would carry no legal consequences" (Pet. App. A27). Nonetheless, the district court held in favor of petitioner on a theory of unjust enrichment, finding that respondent owed petitioner the sums claimed under a quasi-contract that arose from the fact that FNBB suffered the burdens of the letter of credit transactions while respondent enjoyed the transactions' benefits (*id.* at A25).

The court of appeals reversed (Pet. App. A17). It agreed with the district court that there was no "liability" on the part of the branch to FNBB because FNBB and the branches were both part of a single entity; therefore, the Cuban government had not succeeded to any debt owing to FNBB (*id.* at A13). The court of appeals also rejected the district court's quasi-contract theory, finding the theory barred by the act of state doctrine: "[W]ere there an unjust enrichment exception to the act of state doctrine, we would

expect the exception to swallow the rule, for virtually every taking will enrich the sovereign, and to the extent that compensation is not paid that enrichment will have been unjust" (*id.* at A14-A15; footnote omitted).

DISCUSSION

Federal banking law long has recognized that a domestic bank and its foreign branches should be considered separate entities for a variety of regulatory purposes. In rejecting petitioner's argument that FNBB's Cuban branch should be considered as a separate entity for the purposes of these letter of credit transactions, the courts below rejected the broader implications of these regulatory principles. However, the district court and the court of appeals in this case did no more than refuse to apply this regulatory framework to a specific type of commercial transaction. Neither court limited the scope of any existing banking law or regulation or otherwise threatened the viability of the regulatory scheme. Moreover, congressional enactments since 1960 have removed the legal prohibitions that required FNBB to do business through an unincorporated branch in the first place. For these reasons, we do not believe that the decision below warrants further review.

1. The issue in this case is whether the commercial relations engendered between a parent bank and its foreign branch office in the course of a letter of credit transaction may give rise to a legally enforceable debt from the branch to its parent. If so, Cuba's expropriation of FNBB's branch did not extinguish FNBB's right to payment or its ability to seek judicial redress, since Cuba expressly assumed the liabilities of the branch and since respondent's simple refusal to honor a commercial obligation has not been shown to be a public act sufficient to constitute an act of state. See *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 694-695 (1976).

The court of appeals concluded that FNBB and its Cuban branch were merely different components of the same, single entity, and "any obligations of one to the other were not matters of substance" (Pet. App. A13). Therefore, there were no liabilities from the branch to FNBB for Banco Nacional to assume.

2. The court of appeals' decision implicates the regulatory responsibilities of the Comptroller of the Currency, who supervises national banks such as FNBB, and the Federal Reserve Board, which must approve the creation of foreign branches by national banks and which has promulgated regulations that exempt such foreign branches from certain legal requirements imposed upon domestic parent banks. At first blush, the court of appeals' decision appears to create an anomaly, with parent and foreign branch banks being treated as a single entity in commercial transactions and as separate entities for regulatory purposes. The impact of the court of appeals' decision also may be significant to United States banks, which currently have approximately 850 branches in over 65 foreign countries.

Nevertheless, we do not believe that this case calls for review by this Court. Although the decision below may well introduce new difficulties into parent banks' dealings with their foreign branches, the court of appeals has done no more than refuse to find an implied separate entity status between a parent bank and its foreign branch from a variety of disparate federal banking laws and regulations. The court of appeals' decision is supported by at least one prior decision of this Court and by longstanding administrative interpretations of federal banking laws. See *United States* v. *First National City Bank*, 379 U.S. 378, 384 (1965); 3 Fed. Res. Bull. 198, 199 (1917); *Published Interpretations of the Board of Governors of the Federal Reserve System* § 5600 (1980).

The court of appeals rejected petitioner's argument that Section 25 of the Federal Reserve Act, 12 U.S.C. 604, which requires national banks to maintain completely independent accounting records for their foreign branches and to enter the branches' profits or losses as a separate item on the bank's general ledger, is evidence that branches should be treated as separate entities in the context of these letter of credit transactions. Even petitioner acknowledges, however, that Section 25 does not give a branch a separate legal existence (Pet. 13). Moreover, the language of Section 25 and judicial precedent establish that the section is no more than a bookkeeping statute designed simply to facilitate bank examinations. See *First National City Bank* v. *IRS*, 271 F.2d 616, 619 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960). The court of appeals' refusal to expand Section 25 beyond its present boundaries does no violence to the section's purposes. Nor does the court of appeals' holding affect in any manner the various regulations promulgated by the Federal Reserve Board that exclude the foreign branches of domestic banks from various reserve requirements, interest rate ceilings, and limitations on nonbanking activities. See 12 C.F.R. 211.3(b)(1) and (b)(7) (foreign branch offices may guarantee customer's debt and act as insurance agent); 12 C.F.R. 204.1(c)(5) (reserve requirements inapplicable to foreign branch deposits payable only at the branch); 12 C.F.R. 217.0(d) (interest rate ceiling inapplicable to foreign branch deposits payable only at the branch). These regulations permit a domestic bank's foreign branches to compete abroad on an equal footing with foreign banks; they do not purport to require that foreign branches be treated as foreign banks. See 12 U.S.C. 604a.

Similarly, we see no merit in petitioner's argument that the International Banking Act of 1978, 12 U.S.C. (Supp. V) 3102(j)(2), calls for branch offices to be treated as separate

banks. That section provides that a United States branch of a foreign bank shall be treated as if it were a separate entity for purposes of determining which claims have priority in the event the branch is liquidated. Petitioner argues that it would be anomalous to treat foreign branches of American banks as single entities with their parent banks when the section recognizes the American branches of foreign banks as separate entities (Pet. 18-20). However, Section 3102(j)(2) does not purport broadly to define the legal relationship between parent banks and their branches. The section is limited to the narrow situation where a foreign bank's branch is in liquidation, and even then does not require that the branch be treated as a separate entity for all purposes: the section does not, for example, prevent a creditor or depositor of a liquidated branch from pursuing its remedies against the foreign parent bank. Section 3102(j)(2)'s primary purpose is to protect creditors and depositors of foreign banks' branches. See Senate Comm. on Banking, Housing, and Urban Affairs, *International Banking Act of 1978*, S. Rep. No. 95-1073, 95th Cong., 2d Sess. 7 (1978). That purpose is not contravened by the decision below.

3. We also question petitioner's contention that the court of appeals' decision undermines the general purpose of Section 25 to assist the foreign trade of the United States (Pet. 12). The legislative history of the section shows that Congress was concerned in 1913 about the absence of an American banking presence abroad and intended to encourage domestic banks to open foreign branches to assist the United States' foreign trade. However, the legislative history of Section 25 reveals as well that Congress intended home offices closely to control their branches, even though the branches' accounts were to be separately maintained. See House Comm. on Banking and Currency, *Changes in the Banking and Currency System of the United States*,

H.R. Rep. No. 69, 63d Cong., 1st Sess. 30 (1913). Moreover, since 1966 national banks have been permitted directly to acquire and own foreign banks that do not do business in the United States, except incidentally to their international banking transactions. Pub. L. No. 89-485, Section 12(b), 80 Stat. 241-242, codified at 12 U.S.C. (1964 ed. Supp. II) 601 Third. Consequently, in foreign countries that permit United States banks to own local banks, national banks may avoid the practical impact of the court of appeals' decision by conducting their letter of credit transactions with wholly-owned foreign banks.

4. We believe, in addition, that the court of appeals' disposition of the case on the basis of the act of state doctrine was consistent with this Court's precedents—once the court of appeals found FNBB and its Cuban branch to be components of a single entity. In essence, petitioner's claim is for sums that were on deposit with the Cuban branch, or that the branch had a right to collect from various importers, at the time of the expropriation. The court of appeals found that when the Cuban government nationalized the branch, it expropriated these deposits and FNBB's right to payment from the Cuban importers in the same manner as it expropriated the other assets of FNBB that were situated at the branch. This case thus is within the scope of the Court's earlier decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).[1]

Although the conclusion reached by the court of appeals seems unfair to FNBB—which honored its contractual commitments only to have respondent renounce the branch's

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[1]Petitioner has not argued that this Court's decision in *Sabbatino* should be reexamined, and we therefore express no views on the continuing validity of the reasoning of that case or on the act of state doctrine generally. See *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 422 U.S. 1005 (1974).

own obligations—the court of appeals reasonably interpreted the situation as a simple expropriation of FNBB's assets in Cuba. The amounts that the branch "owed" the parent bank were no more than internal FNBB accounts. The parent bank's expectation of repayment was based not upon any legally enforceable right, but instead upon the assumption that its assets temporarily located in Cuba during the process of collection, conversion into dollars, and repatriation ultimately would be returned to Boston. The unfairness FNBB suffered was the unfairness of the expropriation generally. Likewise, there was no greater unfairness to FNBB when it was required to honor the branch's letters of credit even after the expropriation, since the letters were irrevocable obligations of FNBB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Reply Brief

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No. 81-982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL),

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

BRIEF FOR PETITIONER IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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The Solicitor General concedes that the Court of Appeals' decision "may well introduce new difficulties into parent banks' dealings with their foreign branches," and notes that the decision "may be significant to United States banks, which currently have approximately 850 branches in 65 foreign countries." He also recognizes the long-standing federal treatment of a national bank and its foreign branches as separate entities for a variety of regulatory purposes. The Solicitor General nevertheless opposes review of the Court of Appeals' decision in this case.

The Solicitor General first overlooks the fact that there are fundamental political and economic circumstances inherent in international banking which have given rise to separate regulatory treatment for foreign branch banks—principally that a foreign branch is subject to the laws and banking regulations of a host country and conducts its

banking business in a foreign economy using a foreign currency. These same circumstances require separate treatment of foreign branch banks for commercial purposes.

Second, the Solicitor General suggests that U.S. banks can avoid the practical impact of the Court of Appeals' decision by operating abroad through wholly-owned foreign bank subsidiaries.* The Solicitor General's position in this regard ignores, however, the fact that since 1919 national banks have been empowered to engage in international banking in foreign countries through Edge Act subsidiaries, and that the principal obstacle to conducting a banking business abroad through a foreign subsidiary has typically been found in the laws of the foreign country in question.

DISCUSSION

A. The "Separate Entity Doctrine" Reflects Commercial Reality

1. After acknowledging the apparent anomaly created by the Court of Appeals' decision, which would treat parent and foreign branch banks as single entities for commercial purposes and as separate entities for regulatory purposes, the Solicitor General fails to recognize that the regulatory framework developed over time as a reflection of the commercial and economic exigencies faced by banks engaged in international commerce. The separate entity doctrine, which is effectively dismantled by the Court of Appeals' decision, developed in response to the way domestic banks conduct business with their foreign branches, and the way foreign branches conduct business between one another. Put another way, the regulatory framework treats foreign branches as separate entities because that treatment com-

* This mode of operating abroad, according to the Solicitor General, has been available to national banks only since 1966, a date following the events involved in this case. This is incorrect.

ports with commercial and economic reality, not because there is some discrete regulatory goal that is served by affording national banks and their foreign branches separate treatment.

2. The conclusion drawn by the Court of Appeals from its inflexible treatment of the First National Bank of Boston ("FNBB") and its Cuban branches as a single entity for purposes of commercial transactions carried out between them was that "obligations of one to the other were not matters of substance." (A13.) This conclusion, which was apparently accepted by the Solicitor General, is particularly absurd in the context of a letter of credit transaction. In such a transaction, the trade counterpart to the "mere matters of internal bookkeeping" to which the issuing branch's reimbursement obligation is reduced involved the movement of hard goods from the United States to Cuba. Moreover, from the perspective of the beneficiary of the transaction—the U.S. exporter—the obligation of the Cuban branch was enhanced by the confirmation of the letter of credit by the head office, just as any domestic confirmation enhances the obligation of a foreign bank issuer. In any event, the exporter was paid, and the importer received goods. It was a "real" transaction, not merely a set of bookkeeping entries, from the perspective of all parties involved.

3. No step in the commercial transactions at issue would have been different in any way had the issuer of the letters of credit been a separate subsidiary of FNBB, instead of one of its branches. While the Solicitor General suggests using foreign subsidiaries, as opposed to branches, as a way to avoid the practical impact of the Court of Appeals' decision, no reason is given why it makes economic sense, or sense in terms of bank regulatory policy, to recognize the reimbursement obligation in one instance, and deny it in the other.

4. The anomaly created by the Court of Appeals' decision does not fade with the first blush. While the decision may not directly impede regulatory treatment of branches as separate entities, the divorce of the "regulatory" aspects of international banking from its "commercial" aspects does not square with any regulatory purpose. Moreover, by introducing uncertainty as to the viability of commercial transactions carried out by national banks with their foreign branches or between their foreign branches, the principal goal of the regulatory scheme—the enhanced competitiveness of United States banks abroad—may be sharply impeded for no good reason.

5. The Solicitor General finds support for the Court of Appeals' decision in a prior decision of this Court, *United States* v. *First National City Bank*, 379 U.S. 378 (1965), and from a Published Interpretation of the Federal Reserve Board that refers to the insolvency of national banks. But neither this Court's decision, which deals with the jurisdiction and power of the federal courts, nor the Federal Reserve Board's Interpretation, which addresses the protection of branch depositors, is inconsistent with Petitioner's position here unless the "separate entity doctrine" is employed with the same inflexibility that characterized the Court of Appeals' decision. There can be no question that the Court of Appeals' decision marks a sharp departure from long-standing federal precedent—amounting to a rule of hornbook law—and commercial practice. The Solicitor General has in no way addressed the implications of that departure. *See, e.g., Pan-American Bank & Trust Co.* v. *National City Bank of New York*, 6 F.2d 762 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925); *see generally* Heininger, *Liability of U.S. Banks for Deposits Placed in their Foreign Branches*, 11 Law & Policy in International Business 903, 911-18, 930-44 (1979).

B. The Solicitor General's "Practical" Solution Is No Solution at All

1. In suggesting that, in order to solve in a "practical" way the "new difficulties" raised by the Court of Appeals' decision, U.S. banks conduct their commercial operations abroad through wholly-owned foreign banks, the Solicitor General fails to recognize that the laws of many countries, particularly Third World countries where expropriations may be more likely, *prohibit* local operations by foreign banks except through local branches.

2. This was the case in Cuba, where foreign banks were prohibited by law from establishing separate banking corporations, and is likewise the case in many foreign countries where U.S. banks have established a banking presence. *See* Dep't of the Treasury, Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations 5-11, 154-179 (1979). For instance, Argentina, in which FNBB has extensive branch operations, prohibits the conduct of commercial operations by foreign banks through wholly-owned subsidiaries.

3. Even in those foreign countries which allow U.S. banks to conduct local banking operations through wholly-owned subsidiaries, branch operations may be permitted greater flexibility than those of a separately incorporated subsidiary. For example, where local lending limits and other regulatory constraints are based on the capital of the bank, a foreign branch is able to make larger loans than would be the case if lending limits were set by reference to the capital of a small subsidiary. Also, while branches are often required to be separately capitalized, as was the case in Cuba, branch capital requirements are typically less onerous than those imposed on a separately incorporated subsidiary. Moreover, given the historical preference for branch operations, and the extensive branch operations in

place throughout the world, transforming the U.S. banking presence abroad from branch to subsidiary operations could be expensive, and competitively harmful in the near term at very least.

4. Finally, in suggesting that U.S. banks conduct their commercial operations abroad through wholly-owned foreign banks, instead of foreign branches, the Solicitor General implies that only after 1966 (FNBB's Cuban branches were expropriated in 1960) would a national bank have been able to avoid the impact of the Court of Appeals' decision by conducting its foreign operations through wholly-owned foreign banks or foreign subsidiaries. This is incorrect. Banks have been permitted since 1919 to engage, through Edge Act corporations,

> "in international or foreign banking . . . either directly or through the agency, ownership or control of local institutions in foreign countries . . . ." Act of December 24, 1919, § 25(a), 12 U.S.C. § 611.

Among the powers of such an Edge Act corporation is the power "to issue letters of credit." 12 U.S.C. § 615(a).

CONCLUSION

As stated in the Petition for Certiorari, the Court of Appeals for the Second Circuit has reversed long-standing federal precedent, and left in an unsettled state a broad range of commercial transactions of importance to the conduct of international banking, by holding that the payment of funds by a U.S. bank to or for the account of the bank's foreign branch does not give rise to a legally cognizable liability even after that branch has been expropriated. The wholly unjustifiable result of the Court of Appeals' unnecessary break with precedent is that Respondent Banco Na-

cional de Cuba may walk away from more than $1.6 million in Cuban branch letter of credit obligations even though it expressly assumed by operation of law all branch assets *and* liabilities in the context of an expropriation that was otherwise unlawful under international law. The Solicitor General has not fully addresssed the implications of this decision.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
December 2, 1982

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